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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

THE CITY OF SEATTLE, et al., *Appellants*
and
THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Appellant*
v.
ROBERT R. BEEZER, *Appellee*
and
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellee*

On Appeal From the Supreme Court of the State of Washington

JURISDICTIONAL STATEMENT

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INDEX

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Statutes Involved 4

Statement 5

The Questions Are Substantial 13

APPENDICES

A. Opinion of the Supreme Court of Washington, July 48, 1963, 160 Wash. Dec. 559 ..... A-1

Order Denying Petition for Rehearing, October 7, 1963 ..... A-11

Remittitur, October 7, 1963 ..... A-12

Peremptory Writ of Mandamus, October 7, 1963 ..... A-14

B. Opinion of the Court of Appeals, August 30, 1962, 308 F. (2d) 318 (D.C. Cir. 1962) B-1

C. Opinion of the Supreme Court of Washington, July 12, 1962, 60 Wn. (2d) 239, 373 P. (2d) 796 (1962) .. C-1

D. Opinion of the Supreme Court of Washington, October 2, 1962, 60 Wn. (2d) 652, 375 P. (2d) 256 (1962) D-1

E. Statutes Involved:

Federal Power Act, Section 313(b), 16 U.S.C. § 825*l*(b) E-1

Federal Power Act, Section 21, 16 U.S.C. § 814 .. E-1, 2

Revised Code of Washington § 34.84.030 ..... E-2

CITATIONS

CASES: Page

Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8 (1931) 3

Beezer v. *City of Seattle, et al.*, 60 Wn. (2d) 239, 373 P. (2d) 796 (1962) 9, C-1

Beezer v. *City of Seattle, et al.*, 60 Wn. (2d) 652, 375 P. (2d) 256 (1962) 9, 10, D-1

Beezer v. *City of Seattle, et al.*, 162 Wash. Dec. 559 (1963) 2, 11, 12, 18, 20, A-1

City of Seattle, Washington, Project No. 2144, et al., 26 F.P.C. 54 (1961) 5, 6, 12

City of Seattle, Washington, Project No. 2144, et al., 26 F.P.C. 463 (1961) 5, 6

City of Tacoma v. *Taxpayers*, 49 Wn. (2d) 781, 307 P. (2d) 567 (1957), reversed by *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1957) 9, 14

City of Tacoma v. *Taxpayers*, 357 U.S. 320 (1958) ..14, 15, 16, 17, 19, 20

City of Tacoma v. *Taxpayers*, ... Wn. (2d) ...., 371 P. (2d) 938 (1962) 16

Detroit and Mackinac Railway Co. v. *Michigan Railroad Comm'n*, 240 U.S. 564 (1916) 3

First Iowa Hydroelectric Coop. v. *FPC*, 328 U.S. 152 (1946) 19, 20, 21

Harris v. *Central Nebraska Public Power and Irrigation Dist.*, 29 F. Supp. 425 (D.C. Neb. 1938) 16

Hendersonville Light & Power Co. v. *Blue Ridge Interurban Railway Co.*, 243 U.S. 536 (1917) 3

Local No. 438 Construction & General Laborers' Union v. *Curry*, 371 U.S. 542 (1963) 3

Madruga v. *Superior Court*, 346 U.S. 556 (1954) 3

Mercantile National Bank v. *Langdeau*, 371 U.S. 355 (1963) 3

Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916) 3

Pacific Coast Dairy v. *Department of Agriculture of California*, 318 U.S. 285 (1943) 3

Pan American Petroleum Corp. v. *Superior Court*, 366 U.S. 656 (1961) 3

Page

Public Utility District No. 1 of Pend Oreille County, v. *FPC*, 308 F. (2d) 318 (D.C. Cir., 1962), *cert. denied* 372 U.S. 908 (1963), *petition for rehearing denied*, 372 U.S. 956 (1963), *motion for leave to file second petition for rehearing denied*, 11 L. Ed. 2d 101 (1963) 2, 6, 7, 10, 16, 17, 18, 19, 20, B-4

State of Washington Department of Game v. *FPC*, 207 F. (2d) 391 (9th Cir. 1954), *cert. denied*, 347 U.S. 936 (1954) 14, 18, 19

STATUTES AND MISCELLANEOUS:

Constitution, State of Washington, Art. IV, Sec. 4 2

Federal Power Act:

§ 10(a), 16 U.S.C. § 803(a) 6
§ 21, 16 U.S.C. § 814 .....4, 8, 13, 17, 19, 21, E-1, 2
§ 313(b), 16 U.S.C. § 825*l*(b) 6, 8, 13, E-1

Revised Code of Washington:

§ 35.84.030 .....4, 5, 6, 8, 10, 13, 17, 21, E-2
§ 54.16.020 21

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PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellee*

On Appeal From the Supreme Court of the State of Washington

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the Supreme Court of Washington issuing a writ of mandamus to a trial judge commanding the exercise of state court jurisdiction in a collateral attack on the final judgment of the Court of Appeals for the District of Columbia Circuit rendered in the direct review proceedings established by Congress for Federal Power Commission orders. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Washington filed on July 18, 1963 (162 Wash. Dec. 559), denial of a petition for rehearing thereof on October 7, 1963 reflected in the remittitur issued on the same date, and the peremptory writ of mandamus which also issued on October 7, 1963, are all reproduced in Appendix A hereto. The decision of the Court of Appeals for the District of Columbia Circuit is *Public Utility District No. 1 of Pend Oreille County* v. *FPC*, 308 F. 2d 318, *cert. denied*, 372 U.S. 908 (1963), *petition for rehearing denied*, 372 U.S. 956 (1963), *motion for leave to file second petition for rehearing denied*, 11 L. Ed. 2d 101 (October 14, 1963). A copy of the opinion of the Court of Appeals is attached hereto as Appendix B. Two earlier opinions by the Supreme Court of Washington in this cause reported at 60 Wn. 2d 239, 373 P. 2d 796 (1962) and 60 Wn. 2d 652, 375 P. 2d 256 (1962), are attached hereto as Appendixes C and D, respectively.

JURISDICTION

This suit was brought in the Washington Supreme Court under the "all writs" provision of the Washington State Constitution * for a writ of mandamus to compel a trial judge to take jurisdiction and proceed to the trial of a taxpayer's suit. The judgment of the Supreme Court of Washington issuing a writ of

* Article IV, Section 4 ". . . the supreme court shall also have power to issue writs of mandamus . . . and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction . . ." The Washington Code, in the chapter relating to the special proceedings of certiorari, mandamus and prohibition, provides: "A judgment in a special proceeding is the final determination of the rights of the parties therein . . ." (RCW § 7.16.020).

mandamus became final on October 7, 1963, simultaneously with a denial of rehearing (Appendix A-11-12, 14). Notice of this appeal was filed in that court on November 4, 1963. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1257(2). The finality of the judgment below issuing the writ and the availability of review by appeal in this Court are sustained by *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916); *Pacific Coast Dairy* v. *Department of Agriculture of California*, 318 U.S. 285 (1943); *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8 (1931); and *Detroit and Mackinac Railway Co.* v. *Michigan Railroad Comm'n.*, 240 U.S. 564 (1916); *cf. Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961) and *Madruga* v. *Superior Court*, 346 U.S. 556 (1954). Finality of the judgment is also sustained by *Mercantile National Bank* v. *Langdeau*, 371 U.S. 355 (1963), and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963). The appropriateness of appeal is further sustained by *Mercantile National Bank* v. *Langdeau, supra* and *Hendersonville Light & Power Co.* v. *Blue Ridge Interurban Railway Co.*, 243 U.S. 536 (1917).

QUESTIONS PRESENTED

The Federal Power Commission issued a license to a Washington municipality (Seattle) for the construction of a hydroelectric project on a navigable water of the United States, at the same time denying a license to a competing applicant, also a Washington municipality (Public Utility District No. 1 of Pend Oreille County). The Court of Appeals on direct review proceedings under the Federal Power Act brought by the unsuccessful PUD applicant, expressly

upheld the necessary premise of the issuance of the license by FPC that section 21 of the Act grants federal eminent domain powers to Seattle to condemn unimproved lands owned by the PUD essential for the licensed project, irrespective of a state law (RCW § 35.84.030) argued to bar their condemnation. This Court denied certiorari and twice denied rehearing. In these circumstances:

> 1. May the judgment of the Court of Appeals that the state statute cannot bar Seattle from condemning the PUD lands under section 21 of the Federal Power Act be collaterally attacked in the state courts in a taxpayer's suit in which the PUD has joined?

If not held foreclosed by the judgment of the Court of Appeals, the further issue is presented:

> 2. Can the federal eminent domain power granted under section 21 of the Federal Power Act to the City of Seattle as an FPC licensee be overridden by a Washington statute (RCW § 35.84.030) alleged to bar any Washington city from condemning lands held by a Washington Public Utility District even though the lands in question are essential to the construction of the project licensed to the City by FPC as best adapted to the comprehensive development of a navigable waterway of the United States?

STATUTES INVOLVED

The statutes involved are section 313(b) (16 U.S.C. § 825*l* (b)) and section 21 (16 U.S.C. § 814) of the Federal Power Act, and section 35.84.030 of the Revised Code of Washington, all of which are set forth verbatim in Appendix E hereto.

STATEMENT

In 1957, the City of Seattle, Washington, filed an application with the Federal Power Commission for a license to construct the $100 million Boundary hydroelectric project on the Pend Oreille River, a navigable tributary of the Columbia. Full public notice of this application was given as required by the Federal Power Act and FPC regulations.*

Public Utility District No. 1 of Pend Oreille County, Washington, (herein called PUD) intervened in opposition and filed a conflicting application for a project, known as the Z Canyon project, to be built at a site one mile upstream from the Boundary site. Protests to the Seattle application were also made by a number of groups and individuals. In its intervention the PUD objected to the issuance of any license to Seattle on the ground, among others, that Seattle was barred by state law (RCW 35.84.030) from taking certain unimproved lands adjacent to Pend Oreille River necessary for the Boundary project which had been purchased by the PUD for $20,100. The Federal Power Commission consolidated the applications for license and held extensive hearings on the comparative merits of the two projects. In orders of July 10, 1961 and September 6, 1961, the Commission granted a license to Seattle for the Boundary project and denied a license to the PUD for Z Canyon,

* See §§ 4(e) and (f) of the Federal Power Act (16 U.S.C. §§ 797(e), (f)) and §§ 1.36, 4.31 and 4.81 of FPC's Rules of Practice and Procedure, and Regulations. The notice of the Seattle application, issued by FPC on August 21, 1957, appeared in the Federal Register August 27, 1957 (Vol. 22, No. 166, p. 6903) and in local newspapers once each week for four weeks. Similar action was taken in connection with Seattle's application to FPC in 1953 for a preliminary permit for this project.

finding that Seattle's project, in the language of section 10(a) of the Federal Power Act, was:

> ". . . best adapted to a comprehensive plan for this development of the Pend Oreille River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." (26 FPC 54, 139-140 (1961).)

With respect to the issue raised by the PUD that RCW 35.84.030 barred Seattle from taking the PUD's lands necessary for the Boundary project, the Commission held:

> ". . . We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of the PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99; *City of Tacoma* v. *Taxpayers, supra; First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152; *State of Washington Department of Game* v. *FPC*, 207 F 2d 391, cert. den. 347 U.S. 936. And as we found in order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license." (26 F.P.C. 463, 466 (1961).)

The PUD appealed, pursuant to § 313(b) of the Federal Power Act, to the Court of Appeals for the District of Columbia Circuit, again urging that RCW 35.84.030 barred the exercise of section 21 eminent domain powers by Seattle. The Court of Appeals ex-

pressly rejected this contention. It held in a unanimous opinion, affirming the Commission:

> ". . . Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by Section 21 of the Federal Power Act. That is to say, once Seattle has become a federal licensee, does the prohibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?"
>
> * * * * * * * * *
>
> "What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. . . ." (308 F. 2d at 321-322, 323; Appendix B-6-7, 8.)

This Court denied the PUD's petition for certiorari, 372 U.S. 908 (1963), and two requests for rehearing 372 U.S. 956 (1963), 11 L. Ed. 2d 101 (October 14, 1963).

The suit in the Washington courts to which the mandamus action relates was begun on November 29, 1961, by Beezer as a representative taxpayer of the City of Seattle (R. 0001). He was joined therein the next day by the PUD as an intervening party plaintiff (R. 0016). This was shortly after the FPC's order issuing a license to Seattle and while the PUD was taking the direct review proceedings described above to the District of Columbia Circuit. The purported taxpayer's suit sought to litigate exactly the same issue which had

been decided by FPC and which was then pending before the Court of Appeals, namely whether RCW 35.84.030 could bar Seattle from acting under its license and section 21 of the Federal Power Act (16 U.S.C. § 814) to condemn the PUD's lands essential to the Boundary project. The specific relief sought by Beezer and the PUD from the state court was a declaration that the City could not act under its FPC license and an injunction against the City's spending any more money on Boundary project.

Seattle moved for summary judgment on the grounds that "the action constitutes an impermissible collateral attack on the orders of the Federal Power Commission" prohibited by section 313(b) of the Federal Power Act and "that the United States (through section 21 of the Federal Power Act) had preempted jurisdiction of the subject matter of the action." (R. 0031). Judge W. R. Cole, sitting as the Superior Court for King County, granted Seattle's motion for summary judgment as against both Beezer and the PUD on January 9, 1962, holding:

> "I feel that the First Iowa, the Tacoma v. Taxpayers, the State of Washington, Department of Game v. F.P.C., and the Tuscarora Indian Nation cases all hold in effect that state laws cannot prevent the F.P.C. from issuing a license or prevent the licensee from acting under the license under section 21 of the Federal Power Act and in effect, that under the Commerce Clause, the federal government has dominion, to the exclusion of the statutes, over navigable waters.
>
> "I think that this present action in effect is an impermissible collateral attack upon this order of the Federal Power Commission and that, by virtue of 313B of the Federal Power Act, the exclusive

jurisdiction to determine the issues in this matter are with the Circuit Court of Appeals.

"I think that Mr. Beezer actually is bound, as far as we are concerned here in this Court, by the action of the Federal Power Commission." (R. 0042).

The PUD and Beezer appealed to the Supreme Court of Washington. That court in a 6 to 3 opinion filed July 12, 1962 reversed, reaffirming its opinion in its second *Tacoma* case* "that the federal government may not confer powers upon local units of government created by the state beyond the capacity given them by their creator." (*Beezer* v. *Seattle*, 60 Wn. 2d 239, 373 P.2d 796 (1962); Appendix C.) However, the Washington Supreme Court also stated in the same opinion:

"Whether the Federal Power Commission can confer powers of condemnation on cities, which the state legislature has, as a matter of policy expressly prohibited, the federal courts must determine." (Appendix C-4.)

Following the D.C. Circuit's decision on August 30, 1962, Seattle moved the Washington Supreme Court to dismiss Beezer, then still pending before that court on rehearing, as already adjudicated and moot. The court, in a 6-3 opinion filed on October 2, 1962, denied Seattle's motion. It held:

"We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by

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* *City of Tacoma* v. *Taxpayers*, 49 Wn. 2d 781, 307 P. 2d 567 (1957), reversed by *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1957). The several proceedings in the Washington Supreme Court in the Tacoma litigation are frequently referred to as the "Cowlitz cases," after the river involved there.

> certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of [July 12,] [sic] 1962. *Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington.*" (*Beezer* v. *Seattle*, 60 Wn. 2d 652, 375 P. 2d 256 (1962); Appendix D-2.) (Emphasis supplied.)

The court thereupon denied rehearing and remanded the case to the Superior Court for trial of the factual question of whether the PUD's unimproved properties were part of its "electric light plant and system" within the scope of RCW 35.84.030.

Before the Superior Court proceeded with the trial, this Court, as noted above, denied certiorari to the District of Columbia Circuit in *Public Utility District No. 1* v. *FPC* (372 U.S. 908) and denied a petition for rehearing (372 U.S. 956).* Following these actions, Judge Cole again indicated that the case should be dismissed for want of jurisdiction, whereupon Beezer and the PUD sought a special writ of mandamus from the Washington Supreme Court, directed to Judge Cole to compel the trial (R. 0078). In this mandamus action,

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* This was in March, 1963, the same month in which Seattle commenced condemnation proceedings under section 21 of the Federal Power Act in the U.S. District Court for the Eastern District of Washington. The case has still not been assigned a trial date. The PUD has raised RCW 35.84.030 as a bar in that case also, and the issue will doubtless persist, unless set at rest by this Court now, through whatever subsequent proceedings are had.

the Washington Supreme Court rendered a 5-4 decision adverse to Seattle on July 18, 1963, stating:

> "We understand the reluctance of the Superior Court of King County to proceed, as we have directed, because of an intervening decision of the United States Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm.* (August 30, 1962) 308 F. (2d) 318, cert. denied, 372 U.S. 908 (1963), 9 L.Ed. (2d) 716, 83 S. Ct. 719, petition for rehearing denied, 372 U.S. 956, 9 L.Ed. (2d) 980, 83 S. Ct. 950. This reluctance is doubtless strengthened by the concessions of counsel in their briefs in a recent motion to dismiss an appeal, and our own statements in the opinion denying the motion to dismiss (*Beezer* v. *Seattle* (Oct. 2, 1962), 60 Wn. (2d) 652, 375 P. (2d) 256). [Appendix C herein]
>
> "The city of Seattle insists, and the King County Superior Court is apparently inclined to agree, that the United States Court of Appeals decision has rendered moot, and is res judicata of, the litigation now pending in that court."

Nevertheless, the court held:

> ". . . we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those [Section 21 and RCW 35.84.030] issues."
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> * * * * * * * * *
>
> "The refusal of the Supreme Court of the United States to review by certiorari the decision of the Court of Appeals for the District of Columbia adds nothing to that decision as it is not an expression by the Supreme Court of an opinion on the merits . . ." (Appendix A-3, 5.)

The four dissenting Justices of the Washington Supreme Court believed that the state courts lacked further jurisdiction:

> "That judgment [of the Court of Appeals pursuant to section 313(b) of the Federal Power Act] is now final and binding on the P.U.D., and the original issues before us have become moot, but the majority refuses to accept the decision of the only court that has jurisdiction to decide these issues unless and until the United States Supreme Court reviews that decision. Since that court has refused to review the decision of the court of appeals, I see no escape from the conclusion that the litigation is now ended." (Appendix A-10.)

On October 7, 1963, the majority of the Washington Supreme Court denied the City's petition for rehearing, declared its July 18, 1963 decision final, and issued a "Peremptory Writ of Mandamus." That writ provided that the King County Superior Court "has full and complete jurisdiction" and directed that court "to proceed with the trial of said cause." (Appendix A-14-15.) When the Washington Supreme Court announced its action on October 7 the City was already constructing the project, obedient to the FPC orders issuing license. The record of the City-PUD case before FPC showed that even with Boundary's 540,000 kilowatts on the line by 1967 the City would still be short of all of the power required to serve its needs (26 FPC 54, 95). In order to have any hope of meeting this deadline, it was necessary for the City to proceed with construction as quickly as possible. Many construction contracts involving access, clearing and other work for the Boundary site are finished or in process at a cost of about $6,000,000, and notices to proceed have necessarily been given on contracts cov-

ering turbines, generators and other equipment totalling over $13,000,000.

If the federal review proceedings under section 313 (b) are not final but remain subject to collateral attack in the state courts, then the public officials of the City of Seattle have no assurance that their further expenditure of public moneys for the construction of the Boundary project would be legally justified. Furthermore, the issuance of bonds, which will soon be necessary to finance the construction contracts will be rendered impossible with the *Beezer* litigation still pending. In an effort to put these questions at rest and to permit the project to move forward, Seattle filed notice of appeal to this Court on November 4, 1963 (R. 0117) pursuant to 28 U.S.C. § 2101(c) and Rules 10 and 11 of the Rules of this Court.

An application by Seattle to the Washington Supreme Court for a stay of its mandate pending action by this Court was denied on November 8, and a similar application by Seattle to Mr. Justice Douglas as Circuit Justice for the Ninth Circuit was denied on November 9, 1963. Trial commenced in the Superior Court on November 12. The matter is at this writing pending before that court with proposed findings to be filed and argument to be had next month.

THE QUESTIONS ARE SUBSTANTIAL

The judgment by the Supreme Court of Washington (1) that the federal proceedings wherein the license for the Boundary project was issued to Seattle are subject to collateral attack in the state courts, and (2) that a state statute, RCW 35.84.030, invalidates section 21 of the Federal Power Act, would, if novel propositions of law, pose serious questions warranting full briefs, oral argument and detailed consideration

by this Court. This is not necessary, however, because both of these matters, as hereinafter discussed, have been authoritatively decided. Accordingly, the judgment of the Washington Supreme Court should be summarily reversed.

1. The decision by a narrow majority of the Washington Supreme Court permitting a relitigation in the state courts of a federal issue decided in the federal proceedings on issuance of the license to Seattle, directly conflicts with the decision of this Court in *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

In the *Tacoma* case, the City of Tacoma held a Federal Power Commission license to construct a hydroelectric project on a navigable stream (the Cowlitz River). The license had been confirmed by the Ninth Circuit Court of Appeals on direct review brought by the State of Washington and this Court had denied certiorari, 347 U.S. 936 (1954). Subsequently, taxpayers of the City of Tacoma and the State of Washington sought to challenge in the state courts the power of the City, under its Federal license, to take state owned lands (a fish hatchery) necessary for the project. The Washington Supreme Court in what is known as its second Tacoma (or Cowlitz) decision held that the City could not take the state lands under section 21 of the Federal Power Act in the absence of state legislation granting it such power and capacity.*

This Court, on review of the Washington Supreme Court's judgment, stated the issue before it as follows:

> "We come now to the core of the controversy between the parties, namely, whether the license issued by the Federal Power Act to the City of

* See footnote, p. 9, *supra*.

> Tacoma give it capacity to act under that Federal license in constructing the project and delegated to it federal eminent domain power to take, upon the payment of just compensation, the state's fish hatchery—essential to the construction of the project—in the absence of state legislation specifically conferring such authority." (357 U.S. at 333.)

This Court held that this issue, which is indistinguishable from the issue presented in the *Beezer* litigation, either was or should have been litigated in the federal proceeding on issuance of the license:

> "This statute [§ 313(b)] is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. . . . So acting, Congress in § 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. . . . It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have exclusive jurisdiction to review such orders, and that its judgment 'shall be final,' subject to review by this court upon certiorari or certification. *Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts.*" (357 U.S. at 336-337.) (Emphasis supplied.)

Further, under *Tacoma,* Mr. Beezer is bound by the federal proceedings already had in this case. While the State of Washington, unlike in *Tacoma,* expressed no interest in the Seattle licensing proceeding, it as well as Beezer had notice of the license application and is bound by the outcome of these proceedings. *Harris* v. *Central Nebraska Public Power and Irrigation Dist.,* 29 F. Supp. 425 (D.C. Neb. 1938). As this Court concluded in *Tacoma:*

> "[T]he judgment of the Court of Appeals, upon this Court's denial of the State's petition for certiorari, became final under § 313(b) of the Act, and is binding upon the State of Washington, its Directors of Fisheries and of Game, and its citizens, including the taxpayers of Tacoma; and that the objections and claims to the contrary asserted in the cross-complaints of the State, its Directors of Fisheries and of Game, and the Taxpayers of Tacoma, in this bond validation suit, were impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by, the final judgment of the Court of Appeals." (357 U.S. at 341.)

Tacoma is thus a direct, controlling precedent for barring the state court proceedings below in Beezer.* The direct federal review proceedings on the issuance of a license to Seattle became final upon this Court's denial of certiorari of the judgment of the Court of Appeals of the District of Columbia Circuit. The state

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* This was fully recognized by the Washington Supreme Court in its third *Tacoma* decision, in which it construed this Court's *Tacoma* decision (357 U.S. 320) as holding ". . . that attacks on the right of the City of Tacoma to proceed with the construction of these dams [under its FPC license] were 'impermissible collateral attacks upon' the final judgment of the United States Court of Appeals." 60 Wn. 2d 66, 71, 371 P. 2d 938, 941 (1962).

court proceedings then pending below became moot, whether labelled or unlabelled as res judicata, estoppel, waiver or collateral attack. As such they should be summarily dismissed.*

We turn now to the supersedure question which is reached only if this Court's *Tacoma* decision does not bar further proceedings below.

2. The decision of the Washington Supreme Court that RCW 35.84.030 bars Seattle from exercising its federal eminent domain powers under section 21 of the Federal Power Act to take the PUD lands necessary for the licensed Boundary project, not only directly conflicts with the express holding to the contrary by the Court of Appeals for the District of Columbia Circuit, but is contrary to long established principles set forth by this Court.

The question whether RCW 35.84.030 would take precedence over section 21 was expressly put to the Court of Appeals for the District of Columbia Circuit by the PUD on the direct review proceedings of the Federal Power Commission's order granting a license to Seattle for the Boundary project. After noting the direct conflict between the state and federal statute (308 F. 2d at 321-322, Appendix B-6-7, see p. 7, *supra*),

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* Summary action is warranted and desired. This dispute between the City and the PUD is entering its second decade, having started when the City filed application in 1953 with FPC for a preliminary permit. The PUD intervened urging RCW 35.84.030 as a bar to Seattle. (See dissenting opinion of Judge Donworth in *Beezer v. Seattle*, 60 Wn. 2d 239 (Appendix C)). The dispute is thus rivalling the protracted series of suits noted by this Court in *Tacoma* (357 U.S. at 322), and is certain to continue as a consequence of the Washington Supreme Court's mandate unless there is a summary reversal.

the Court of Appeals in a unanimous opinion by Chief Judge Miller, joined by Judges Bazelon and Bastian held:

> "... What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. . . ." (308 F. 2d at 323, Appendix B-8.)

The Washington Supreme Court below, while recognizing the holding of the Court of Appeals,* refused to follow it:

> "The issues involved in that litigation [Beezer v. Seattle] are of such importance and we are so completely convinced that we are right in the position taken in our opinion in *Beezer* v. *Seattle* (Public Util. Dist. No. 1 of Pend Oreille County, Intervenor, July 1, 1962, 60 Wn. 2d 239, 373 P. (2d) 796), that we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those particular issues." (Opinion of July 18, 1963, Appendix A-3.)

However, the Court of Appeals decision was not unprecedented. It was based on long established principles enunciated by this Court.

The first decision relied upon by the Court of Appeals was *State of Washington Department of Game*

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* "The opinion of the Court of Appeals for the District of Columbia, to which we have been referring, *after holding that Seattle has the right to condemn any property of the P.U.D. despite our statutory prohibition. . . .*" (Opinion of July 18, 1963, Appendix A-6-7; emphasis supplied.)

v. *Federal Power Comm'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied* 347 U.S. 936 (1954), which held that certain statutes of the State of Washington requiring a permit for the diversion of water, approval of the State Directors of Fish and Game and limiting the height of dams within the State to 25 feet, were void as conflicting with the Federal Power Act. The Ninth Circuit in turn relied on this Court's decision in *First Iowa Hydroelectric Coop* v. *Federal Power Comm'n.*, 328 U.S. 152 (1946), and held as follows:

> "The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.
>
> "Again, we turn to the First Iowa Case, supra. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.
>
> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the license from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." (207 F. 2d at 396)

As noted by the District of Columbia Circuit, this Court in *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) construed, without disavowal, the holding of the Ninth Circuit in the *State of Washington Department of Game* case as upholding the right of the City of Tacoma to exercise federal eminent domain

powers under section 21 to take a State owned fish hatchery as against a contention that it lacked such power and capacity under Washington law. The D. C. Circuit quoted *Tacoma* as follows:

> "'But the respondents say that the Court of Appeals did not decide the question of legal capacity of the City to act under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:
>
> * * * * * * * * *
>
> "'We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible 'indebtedness limitations' in the City's Charter and 'questions of this nature, '*not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license . . .*' (Emphasis added.)" (308 F. 2d at 322-323, citing 357 U.S. at 339-40.)

The conviction by the majority of the Washington Supreme Court below that "we are right" in this matter thus runs counter to well established federal law dating back to this Court's decision in *First Iowa* upon which the Ninth Circuit (confirmed by this Court in *Tacoma*) and the District of Columbia Circuit have held that federal eminent domain powers granted by section 21 are available to municipal licensees to effectuate the comprehensive development of the nation's navigable waters in the construction of projects approved by the Commission, as against a veto power in

the state.* No useful purpose would be served by this Court going over this well settled ground again. Accordingly, appellants urge that the judgment below be summarily reversed.

Respectfully submitted,

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December 16, 1963

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* If the state statute governed and were construed as the PUD would have it, it would veto any development of the Pend Oreille River. Seattle had acquired substantial property in the Boundary project area even by the time of the FPC hearing. Under a Washington law relating to city utility systems (RCW § 54.16.020), similar to the provision relating to PUD properties which the PUD says is controlling (RCW § 35.84.030), PUD's may not condemn electric properties of cities. Thus, under the PUD's contention in *Beezer*, even if it were to get a license from FPC, the PUD would not be able to construct a project. Similarly, under Washington law, investor owned power companies may not condemn municipally owned utility properties. The result would be a complete stalemate, and the purpose of the Federal Power Act as declared by this Court in *First Iowa Hydro-Elec. Coop.* v. *FPC* ". . . to make progress with the long idle water power resources of the nation. . . ." (328 U.S. 152, 171 (1945)), would be nullified.

APPENDIX A

Opinion of the Supreme Court of Washington of July 18, 1963 (160 Wash. Dec. 559); Order Denying Rehearing, Remittitur and Peremptory Writ of Mandamus Issued October 7, 1963

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37037
EN BANC

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 of PEND OREILLE COUNTY, WASHINGTON, *Intervenor and Relator,*

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Respondent.*

This is an application by the plaintiff, Robert R. Beezer, for a writ of mandamus to compel the Superior Court of King County to proceed as heretofore directed by this court:

> "We, therefore, set aside the summary judgment of dismissal, and direct the trial court to proceed with the determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an 'electric power and light plant or electric system, or any part thereof.' If it is not, the action should be dismissed and the city left free to proceed to exercise its power of condemnation. If it is, we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the

> property by negotiation and proceed under its license; and it should not be precluded from so doing." Beezer v. City of Seattle (1962), 60 Wn. (2d) 239, 243, 373 P. (2d) 796, 798.

The foregoing statement from the *Beezer* case makes clear the factual issue for determination in the litigation now pending in the Superior Court of King County (King County Superior Court civil cause No. 576444, Robert R. Beezer, Plaintiff, v. City of Seattle, Defendant; Public Utility District No. 1 of Pend Oreille County, Washington, Intervenor). This determination is necessary because of our statute[1] which has at all times since 1933 prohibited the condemnation by a city of the

> ". . . electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

The city of Seattle has, at all times, taken the position that while the proper[illegible] of the public utility district which it proposes to condemn does not fall within this prohibition, nevertheless it is unnecessary to determine that fact because its license from the Federal Power Commission gives it the authority to condemn any property of the

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[1] "Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; *nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to* or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a *public utility district.*" RCW 35.84.030 (Emphasis supplied)

public utility district necessary to the development of the hydroelectric project it is licensed to develop and operate; in short, that it can exercise (under its license) a power which the state law has, since practically the inception of public utility districts, prohibited it from exercising.

We understand the reluctance of the Superior Court of King County to proceed, as we have directed, because of an intervening decision of the United States Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm.* (August 30, 1962), 308 F. (2d) 318, cert. denied, 372 U.S. 908 (1963), 9. L. Ed. (2d) 716, 83 S. Ct. 719, petition for rehearing denied, 372 U.S. 956, 9 L. Ed. (2d) 980, 83 S. Ct. 950. This reluctance is doubtless strengthened by the concessions of counsel in their briefs in a recent motion to dismiss an appeal, and our own statements in the opinion denying the motion to dismiss (*Beezer* v. *Seattle* (Oct. 2, 1962), 60 Wn. (2d) 652, 375 P. (2d) 256).

The city of Seattle insists, and the King County Superior Court is apparently inclined to agree, that the United States Court of Appeals decision has rendered moot, and is res judicata of, the litigation now pending in that court.

The issues involved in that litigation are of such importance, and we are so completely convinced that we are right in the position taken in our opinion in *Beezer* v. *Seattle* (Public Util. Dist. No. 1 of Pend Oreille County, Intervenor), July 12, 1962, 60 Wn. (2d) 239, 373 P. (2d) 796, that we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those particular issues.

We recognize the finality of the Court of Appeals decision in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm., supra,* insofar as it determines that

the city of Seattle—and not Public Utility District No. 1 of Pend Oreille County—is entitled to a license from the Federal Power Commission to develop its hydroelectric project on the Pend Oreille River. We recognize also that our statute (RCW 35.84.030) does not preclude the city of Seattle from exercising that license and was no bar to its issuance. We are here concerned only with a limitation on the manner of its exercise. Our statute does not prohibit the city from condemning the property of the public utility district (hereinafter called P.U.D.) unless that property is its "electric power and light plant or electric system, or any part thereof."

When, in 1930, the state adopted (by the initiative) the public-utility-district law, it contained, and still does, a provision prohibiting such a district from condemning a public utility owned by a city or town (RCW 54.16.020). In 1933, the legislature made the prohibition work both ways—by forbidding any city or town from acquiring by condemnation

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district." RCW 35.84.030.

The obvious wisdom and desirability of such a prohibition has not heretofore been questioned, though public power has here moved further and faster through municipal corporations of varying character than in any other state; nor has the power of the state to place such a prohibition on the municipal corporations created by it been questioned.

Can the Federal Power Commission by a license granted to a city, existing under and by virtue of the laws of the state of Washington, give it a power which it has been prohibited from exercising by that state?

Here, stripped of all the trappings of res judicata and federal pre-emption, is the heart of this controversy. It presents a problem in federal-state relationships which can be decisively answered only by the United States Supreme Court.

Our right to determine the meaning of the statutes of this state is clear; and it is equally clear that in the construction of federal statutes only the decisions of the Supreme Court of the United States are binding upon us. As we said in *Home Insurance Co. of New York* v. *Northern Pacific Railway Co.* (1943), 18 Wn. (2d) 798, 808, 140 P. (2d) 507, 147 A.L.R. 849:

> "When a Federal statute is construed by a United States court of appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, but it is not binding on us if we do not deem it logical or sound. . . .
>
> ". . . In order that there may be no doubt about what the rule is in this state, we now declare it to be that the construction placed upon a Federal statute by the inferior Federal courts, while entitled to great weight by the courts of this state, is not binding upon them."

The refusal of the Supreme Court of the United States to review by certiorari the decision of the Court of Appeals for the District of Columbia adds nothing to that decision as it is not an expression by the Supreme Court of an opinion on the merits. *Elgin, J. & E. R. Co.* v. *Gibson* (1957), 355 U.S. 897, 2 L. Ed. (2d) 193, 78 S. Ct. 270; *Brown* v. *Allen* (1953), 344 U.S. 443, 491-92, 97 L. Ed. 469, 507, 73 S. Ct. 397, 437, 439; *United States* v. *Carver* (1923), 260 U.S. 482, 490, 67 L. Ed. 361, 364, 43 S. Ct. 181, 182.

Nor is res judicata applicable in the present case. The proceeding in the Court of Appeals for the District of Columbia (*Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm., supra*) was the review of an ad-

ministrative order of the Federal Power Commission granting a license to the city of Seattle. The parties were the city of Seattle, the Pend Oreille County P.U.D. (both seeking a license), and the Federal Power Commission.

The case now pending in the King County Superior Court is a taxpayer's suit in which Robert R. Beezer is plaintiff, the city of Seattle is defendant, and the Pend-Oreille P.U.D. is an intervenor. The subject matter is not the granting of a license under a federal statute, but whether the Federal Power Commission license having been granted the properties of the Pend Oreille County P.U.D., sought to be condemned by the city of Seattle, are its "electric power and light plant or electric system, or any part thereof." If that question is answered in the affirmative, there comes the further question: Has the city of Seattle the power to proceed with a condemnation of such properties? The answer is clearly in the negative so far as our state statutes are concerned, but there is the additional question of whether the Federal Power Commission license can give the city of Seattle such power notwithstanding the express prohibition of the state statute.

The subject matter, the parties, and the purpose of the proceedings are different; hence, the doctrine of res judicata does not apply. See *Burke Motor Co.* v. *Lillie* (1952), 39 Wn. (2d) 918, 239 P. (2d) 854; *Curtiss* v. *Crooks* (1937), 190 Wash. 43, 66 P. (2d) 1140.

Somewhat paradoxically we never reach this burning controversy, if it is determined that the property of the P.U.D. which the city seeks to condemn is *not* its "electric power and light plant or electric system, or any part thereof," within the purview of RCW 35.84.030.

The opinion of the Court of Appeals for the District of Columbia, to which we have been referring, after holding that Seattle has the right to condemn any property of the

P.U.D. despite our statutory prohibition, says that anyway the properties of the P.U.D., which the city of Seattle seeks to condemn, do not fall within the prohibition.

This later declaration seems to us no more than an advisory opinion on an issue then, and now, properly pending before the Superior Court of King County which we have heretofore directed that court to determine. This is the type of determination which the Supreme Court of the United States recently referred to as a "preliminary guess" regarding local law. *Leiter Minerals, Inc.* v. *United States* (1957), 352 U.S. 220, 229, 1 L. Ed. (2d) 267, 275, 77 S. Ct. 287, 292.

Mr. Justice Harlan, in his concurring opinion in *Tacoma* v. *Taxpayers of Tacoma* (1958), 357 U.S. 320, 342, 2 L. Ed. (2d) 1345, 1358, 78 S. Ct. 1209, 1221, said:

> ". . . I do not understand the Court to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with authority to decide any issues of state law if such law were deemed controlling, or that had the Court of Appeals undertaken to do so, such a determination would have foreclosed reexamination of such a decision in other proceedings."

It is our view that the decision and the opinion of the Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend Oreille County* v. *Federal Power Comm., supra,* is not decisive of the issues now pending in the Superior Court of King County, and that court should proceed in accordance with our former direction.

The writ of mandamus will issue.

HILL, J.

We concur:

OTT, C. J.

WEAVER, J.

HUNTER, J.

HALE, J.

APPENDICES

DONWORTH, J. (dissenting)—This is the fourth time this case has been before us in the past year. (*Beezer* v. *Seattle*, 60 Wn. (2d) 239, 373 P. (2d) 796 (1962), and *Beezer* v. *Seattle*, 60 Wn. (2d) 652, 375 P. (2d) 256 (1962); in addition, a motion for a stay of proceedings made by the city of Seattle was argued and denied without opinion on November 19, 1962.)

The present proceeding is an application for a writ of mandamus to compel the superior court to proceed with the trial of the cause on the merits as directed by this court in the decision first above cited.

The history of this litigation is described in some detail in the dissenting opinions in the two prior decisions.

The last paragraph of the first dissent reads as follows:

> "Because the F.P.C. did not find it necessary to decide the question urged upon us by appellants and for the further reason that the court of appeals has exclusive jurisdiction of the controversy, it is my opinion that the trial court correctly held that it had no jurisdiction of the controversy, and its judgment dismissing the action should be affirmed."

When the case came before us the second time, the United States Court of Appeals for the District of Columbia had just rendered its decision upholding the order of the Federal Power Commission, issued July 10, 1961, granting a license to the city of Seattle to construct and operate the Boundary Dam, and denying the PUD's application for a similar license with respect to its proposed adjacent Z Canyon project. See *Public Utility Dist. No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. (2d) 318.[1]

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[1] The pertinent portion of the decision of the Court of Appeals states:

"What precedes makes it clear that the State statute, here involved, even if according to its own terms it is applicable, cannot

The majority opinion of this court, denying the city's motion to dismiss the PUD's appeal from the trial court's dismissal of the case for lack of jurisdiction, concluded as follows:

> "We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, *unless, and until,* the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington." (Italics mine.)

In the dissenting opinion, it was stated that the controversy before this court was then moot because the sole issue of fact to be tried in the superior court had become

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make it impossible for Seattle as a federal licensee to condemn under the federal statute. Were it otherwise—i.e., if indeed the limitation of the state-granted right of eminent domain prevented the exercise of federally-granted power of condemnation in the area proscribed by it—PUD's argument that it disables Seattle in this situation could not be upheld. For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land."

immaterial under the decision of the court of appeals. It was there said:

> ". . . It could become material only if the United States Supreme Court should (a) grant the public utility district's proposed petition for certiorari and (b) subsequently reverse the decision of the Court of Appeals. . . ."

Now that the PUD *has* petitioned the United States Supreme Court for a writ of certiorari to review the decision of the Court of Appeals, and its petition *has been* denied (372 U.S. 908, 9 L. Ed. (2d) 716, 83 S. Ct. 719), and notwithstanding the fact that the PUD has petitioned for a rehearing of its certiorari petition and that the latter has been denied by the Supreme Court (372 U.S. 956, 9 L. Ed. (2d) 980, 83 S. Ct. 950), the majority of this court still persist that "we are so completely convinced that we are right in the position taken in our opinion" in the first *Beezer* case (60 Wn. (2d) 239, 373 P. (2d) 796), "that we are unwilling, absent a decision by the United States Supreme Court, to accept the opinion of the United States Court of Appeals as decisive of those particular issues."

This position seems to me to be inconsistent with the statement of the majority in the second *Beezer* decision to the effect that the issues would not become moot "unless, and until" the judgment of the court of appeals should become final and binding on the PUD.

That judgment is now final and binding on the PUD, and the original issues before us have become moot, but the majority refuses to accept the decision of the only court that has jurisdiction to decide these issues unless and until the United States Supreme Court reviews that decision. Since that court has refused to review the decision of the court of appeals, I see no escape from the conclusion that the litigation is now ended.

Even if the views expressed in the two prior dissents be considered as premature, the issues before the superior court are now certainly moot. The very things that the majority previously said would cause the issues to become moot have now occurred, and, if there ever was any basis for a contrary holding, there is now no basis for the majority opinion in the present appeal.

In my opinion, the writ of mandamus should be denied.

DONWORTH, J.

We concur, ROSELLINI, J.
HAMILTON, J.

I fully concur in Judge Donworth's dissent. In my judgment, its logic and common-sense views are unanswerable.

FINLEY, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Order Denying Petition for Rehearing

No. 37037

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Intervenor and Relator,* THE SUPERIOR COURT FOR KING COUNTY, W. R. COLE, JUDGE, *Respondent.*

The Court having considered the defendant-respondents' petition for a rehearing herein, together with the answer of Public Utility District No. 1 of Pend Oreille County and the answer of Relator Beezer, and a majority of the Judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.
Dated this 7th day of October, 1963.
By the Court.

/s/ RICHARD B. OTT
Chief Justice

162 Wash. Dec. 559

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Remittitur

No. 37037

King County No. 576444

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor and Relator,*

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE,
Respondent.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 18, 1963, became the final judgment of this court in the above entitled case on October 7, 1963. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Costs will abide the final determination of the cause. The Petition for Rehearing was Denied October 7, 1963. A copy of Peremptory Writ of Mandamus attached.

cc: Court Reporter
Mr. Clarence C. Dill
Schweppe, Reiter, Doolittle & Krug
Mr. Alfred J. Schweppe
Hon. A. C. VanSoelen
Mr. A. L. Newbould
Helsell, Paul, Fetterman, Todd
and Hokanson
Mr. Richard S. White
Mr. Richard W. Bartke
Mr. William G. Ennis

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 7th day of October, A.D. 1963.

William M. Lowery
Clerk of the Supreme Court,
State of Washington.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37037

Peremptory Writ of Mandamus

ROBERT R. BEEZER, *Plaintiff and Relator,*

v.

THE CITY OF SEATTLE, ET AL., *Defendant and Respondent,*

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor and Relator,*

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Respondent.*

TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR KING COUNTY, HONORABLE W. R. COLE, JUDGE THEREOF

WHEREAS, it appears from the petition for a writ of mandamus filed herein by the relator, and joined in by the intervenor, that the respondent, Honorable W. R. Cole, sitting as judge of the Superior Court of the State of Washington for King County, has decided to dismiss for want of jurisdiction that certain action entitled *Robert R. Beezer, plaintiff,* v. *The City of Seattle, et al., defendants, Public Utility District No. 1 of Pend Oreille County, Washington, Intervenor,* being cause No. 576444 in the files and records of said court, and has stated that he will enter an order and judgment to that effect, and

WHEREAS, this court issued an alternative writ of mandamus commanding and ordering that the respondent, the said Superior Court of the State of Washington for King County and the said Honorable W. R. Cole, Judge, appear before this court at Olympia, Washington on the 9th day of May, 1963 to show cause why a writ of mandamus should not be issued by this court directing him to proceed to trial in said cause No. 576444, and

WHEREAS, this court on May 9, 1963 considered the petition of relator and the return of the respondent, and

WHEREAS, on July 18, 1963 it was the decision of this court that said cause No. 576444 should proceed to trial and that said King County Superior Court has full and complete jurisdiction to proceed with the trial of said cause on its merits and the decision of the supreme court having become final on October 7, 1963; NOW THEREFORE, in conformity with the decision of this court, IT IS HEREBY

ORDERED that the respondent, the Superior Court of the State of Washington for King County and the said W. R. Cole, Judge, shall proceed forthwith to the trial and entry of judgment on the merits in King County Superior Court Cause No. 576444 entitled Robert R. Beezer, plaintiff, v. The City of Seattle et al., defendants, Public Utility District No. 1 of Pend Oreille County, Washington, intervenor.

Dated this 7th day of October, 1963.

/s/ RICHARD B. OTT
Chief Justice

APPENDIX B

Opinion of the Court of Appeals of August 30, 1962
(308 F. 2d 318 (D. C. Cir. 1962))

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,653

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
CITY OF SEATTLE, INTERVENOR

Petition for Review of Order of the Federal Power Commission

Decided August 30, 1962

Messrs. Clarence C. Dill and *Joseph Volpe, Jr.*, with whom *Mr. Bennett Boskey* was on the brief, for petitioner.

Miss Josephine H. Klein, Attorney, Federal Power Commission, with whom *Messrs. Ralph S. Spritzer*, General Counsel, Federal Power Commission, at the time the brief was filed, *Howard E. Wahrenbrock*, Solicitor, *Leonard D. Eesley*, Assistant General Counsel, and *Joseph B. Hobbs*, Attorney, were on the brief, for respondent. *Mr. Arthur H. Fribburg*, Attorney, Federal Power Commission, also entered an appearance for respondent.

Mr. Richard S. White, of the bar of the Supreme Court of Washington, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. McCarty* and *Charles F. Wheatley, Jr.*, were on the brief, for intervenor.

Before WILBUR K. MILLER, *Chief Judge*, and BAZELON and BASTIAN, *Circuit Judges*.

WILBUR K. MILLER, *Chief Judge:* On July 29, 1957, the City of Seattle applied to the Federal Power Commission

for a license[1] to construct and operate a hydroelectric project at what is called the "Boundary" site on the Pend Oreille River. Public Utility District No. 1 of Pend Oreille County, a municipal power corporation of the State of Washington, on August 27, 1957, petitioned to intervene, and later filed an application for a license for a similar project at its Z Canyon site, about one mile south of Seattle's "Boundary" location. At a hearing conducted by the Commission on these mutually exclusive applications, PUD argued that certain employees of the U. S. Bureau of Reclamation, who prepared the technical portions of Seattle's original application[2] and accepted compensation therefor, thereby violated 18 U. S. C. § 281,[3] often called a conflict of interest statute, and that the City of Seattle was equally guilty under 18 U. S. C. § 2.[4] PUD

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[1] Under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), 49 STAT. 839.

[2] One of them testified at the hearing before the examiner.

[3] Section 281 is, in pertinent part, as follows:

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

[4] Section 2 is as follows:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

insisted that, because of these alleged criminal acts, the material prepared by the government employees should be rejected, and Seattle should be disqualified as an applicant.

The examiner gave careful consideration to PUD's contention concerning § 281 and found the record presented "no conceivable conflict of interest," and on rehearing the Commission said on that subject:

> ". . . On the record before us, we can find no conflict of interest which as a matter of policy would impel us to exclude the testimony and exhibits in question. And apart from such a conflict of interest as might require their exclusion as a matter of policy, we know of no basis in law or equity for excluding said testimony and exhibits. We cannot conclude, as PUD would have us do, that the appearance of Mr. Winter [the Board of Reclamation witness] and the admission into evidence of exhibits prepared by him and others constitute an assault upon the 'integrity of the administrative process' which requires dismissal of Seattle's application."

So, the Commission sustained the examiner's ruling on the conflict of interest question; and in accordance with his recommendation also rejected the other arguments of PUD and awarded a license to Seattle. PUD petitions for review.

Vigorously pressing upon us its contention that the Commission erred in not dismissing Seattle's application because of the alleged violations of § 281, PUD relies, *inter alia*, on the Dixon-Yates case[5] and *May* v. *United States*, 84 U. S. App. D. C. 233, 175 F. (2d) 994, *cert. denied* 338 U. S. 830 (1949).

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[5] United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

The Supreme Court held in the Dixon-Yates case that the primary purpose of the statute there involved[6] "is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government." The Court said a criminal prosecution is not the Government's sole remedy in a case such as Dixon-Yates, and that the public interest can be fully protected "only if contracts which are tainted by a conflict of interest on the part of a government agent *may* be disaffirmed by the Government." (Emphasis added.) 364 U.S. at 563.

But the Dixon-Yates case does not hold, nor does any other authority to our knowledge, that a transaction is automatically void because there may have been involved in it a technical violation of the conflict of interest statutes. Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest because of the alleged violations of § 281, and no criminal action has been instituted against the parties accused by PUD.

The case of *May* v. *United States*, cited by the petitioner, holds, 84 U. S. App. D. C. at 245, 175 F. (2d) at 1006:

> "... [I]f a Congressman receives compensation for services rendered by him to a person in relation to any matter in which the United States is interested, before any Government department, he is guilty of violating the statute [18 U. S. C. § 216], even though the service rendered was a proper act on his part. ..."

But the Government department before which May appeared was not required to repudiate or disregard things properly said or done by him in his appearances merely because he may have violated the law by receiving com-

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[6] 18 U.S.C. § 434.

pensation for appearing. For this reason we think the *May* case is not helpful to petitioner here.

We find nothing in the record to indicate that there was here the "influence peddling" at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more weight to the material furnished by the government employees than if it had been prepared by others. Moreover, § 281, a criminal statute, prescribes no civil or administrative sanctions. Even if it has been technically violated here, it does not follow that the grant of a license to Seattle should be set aside for that reason alone.

In another argument against the Commission's grant of a license to the City, PUD suggests that Seattle is not qualified to be a licensee, as it cannot acquire by purchase land indispensably necessary to its project because PUD owns the land and is unwilling to sell it. It further suggests that Seattle is unable to acquire the land by condemnation because the Washington statute which confers the powers of eminent domain on a city which owns its own electric power and light plant forbids its exercise with respect to "the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."[7] For these reasons, PUD contends that Seattle did not and cannot submit to the Commission

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[7] Revised Code of Washington (1951), § 35.84.030:

"§ 35.84.030. LIMITATION ON RIGHT OF EMINENT DOMAIN. Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall . . . acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

> "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks . . ."

as required by Section 9(b) of the Federal Power Act.[8] It is said that, therefore, Seattle's application should have been denied.

The Supreme Court has held that Section 9(b) does not in itself require compliance with state law; it only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be "appropriate to effect the purposes of a federal license on the navigable waters of the United States." *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 167 (1946). Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by Section 21 of the Federal Power Act.[9] That is to say, once Seattle has become a federal licensee, does the pro-

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[8] 16 U.S.C. § 802(b), 41 STAT. 1068.

[9] 16 U.S.C. § 814, 41 STAT. 1074:

> "Sec. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

hibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?

A similar problem was presented to the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n.*[10] There a license issued by the Power Commission to the City of Tacoma was attacked because the City had not obtained the approval of certain State officials as required by statutes of Washington and because the proposed dams would exceed the height limits the Washington legislature had put upon dams in the streams involved. The objectors contended that Tacoma, a creature of the State of Washington, could not act in opposition to the policy of the State or in derogation of its laws.

Relying on the *First Iowa case, supra,* the Court of Appeals for the Ninth Circuit held that "the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." 207 F. (2d) at 396. After this unequivocal holding, the Ninth Circuit went on to say:

> ". . . However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them."

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[10] 207 F. (2d) 391 (1953), *cert. denied* 347 U.S. 936 (1954).

PUD relies on this language in arguing the court did not hold that Tacoma might act under the federal license in a manner prohibited by state law.

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958), the Supreme Court, in considering the same argument which PUD advances here, had occasion to construe the Ninth Circuit opinion. It said, at pages 339-40:

> "But the respondents say that the Court of Appeals did not decide the question of legal capacity of the City to act under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:
>
> " '[. . .] However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.' [207 F. (2d) at 396.]
>
> "We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible 'indebtedness limitations' in the City's Charter and 'questions of this nature,' *not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license. . . .*" (Emphasis added.)

What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute.

Were it otherwise—*i.e.*, if indeed the limitation of the state-granted right of eminent domain prevented the exercise of federally-granted power of condemnation in the area proscribed by it—PUD's argument that it disables Seattle in this situation could not be upheld. For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land.

PUD attacks the Commission's action on several other grounds. Among them is the contention that the Commission deprived it of "a fair hearing on the economic and engineering feasibility of the conflicting projects by reserving for subsequent *ex parte* adjudication substantial issues relating to mine damage." The argument is based on the fact that Seattle did not propose, and the Commission did not require, elaborate and expensive precautions against damage to extensive lead and zinc mines in the area which PUD says may result from the construction of Seattle's dam.

Mining interests intervened before the Commission, contending that neither project should be licensed because either would threaten substantial permanent damage to their properties. Many expert witnesses testified on the mine damage issue, which was heard separately. The examiner concluded the possibility of damage was too slight and remote to require the refusal of a license. The

Commission agreed. It said it did not anticipate serious damage to the mines from the Boundary reservoir but did require that certain steps be taken to guard against it. In addition, the Commission inserted the following in Seattle's license:

> "Article 43. The licensee shall take appropriate measures to assure the watertightness of the reservoir, and the Commission reserves the right to require the licensee to take such measures both prior to and after the initial filling of the reservoir."

This is the so-called reservation of the mine damage issue "for subsequent *ex parte* adjudication" which PUD says deprived it of a fair hearing on the economic and engineering feasibility of the projects.

We consider Article 43 as no more than a requirement that, in addition to the specific precautionary measures prescribed elsewhere in the license, the licensee meet any unforeseen condition which may develop, and an assurance that the Commission will exercise continuous supervision over the project. The record justified the action of the Commission in this regard and did not demonstrate the necessity for making any further requirements of the licensee. We regard it as significant that the mining interests have not petitioned for review and have not sought to intervene in this proceeding.

The remaining points urged by PUD do not seem to us to require discussion. They relate to matters about which the Commission had discretion which it did not abuse.

Affirmed.

APPENDIX C

Opinion of the Supreme Court of Washington of July 12, 1962 (60 Wn. 2d 239, 373 P. 2d 796 (1962))

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36486

EN BANC

ROBERT R. BEEZER, *Appellant*,

v.

THE CITY OF SEATTLE, GORDON S. CLINTON, as Mayor of said City, and M. B. MITCHELL, DAVID LEVINE, CHARLES M. CARROLL, CLARENCE F. MASSART, J. D. BRAMAN, MYRTLE S. EDWARDS, FLOYD C. MILLER, BOB JONES and PAUL J. ALEXANDER, as the duly constituted Council of the City of Seattle, *Respondents*,

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellant*.

Filed July 12, 1962

The issue presented is another and, as yet, unexplored facet of the obligation of a municipal corporation, existing under and by virtue of the laws of the state of Washington, to comply with the laws of that state.

The city of Seattle has applied for and received a license from the Federal Power Commission for the development of a hydroelectric project on the Pend Oreille River (referred to herein as the Boundary project), and involving the construction of a dam on a site presently owned by Public Utility District No. 1 of Pend Oreille County. (It is conceded that the city intends to condemn this and other property of the P.U.D.)

In 1930, the people of this state adopted, by the initiative, the public-utility-district law,

> "... to conserve the water and power resources of the State of Washington for the benefit of the people

> thereof, and to supply public utility service, including water and electricity for all uses." Laws of 1931, chapter 1, § 1, p. 3.

As adopted, it contained, and still does, a provision forbidding a district created thereunder from condemning any public utility owned by a city or town (RCW 54.16.020).

In 1933, the legislature made the prohibition work both ways by forbidding any city or town from acquiring by condemnation,

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district." RCW 35.84.030[1]

This is a declaratory judgment action predicated on the proposition that the city of Seattle, faced with this express prohibition, cannot acquire by condemnation the property of Public Utility District No. 1 of Pend Oreille County; and, consequently, should be enjoined from the expenditure of money in the furtherance of a project which it cannot complete.

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[1] "Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a public utility district." RCW 35.84.030.

The trial court entered a summary judgment dismissing the action, apparently believing that the issue had been determined in the prior litigation involving the right of the city of Tacoma to build dams on the Cowlitz River.[2]

We do not regard anything actually decided in the Cowlitz litigation as decisive of the present case. In the first place, it was conceded that when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do. Here, the city of Seattle, at the time it applied for its license to proceed with the Boundary project, had a known and express limitation on its power, *i.e.*, it could not condemn

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

This was not necessarily a disqualification as a licensee, because it was entirely possible, and for a time appeared probable, that the city would acquire by mutual agreement with the P.U.D. the property it required.

In the second place, it has been, and is, our view that the Supreme Court of the United States in *City of Tacoma* v. *Taxpayers* (1958), 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209, did not pass upon the proposition which we deemed decisive in our second Cowlitz case (*City of Tacoma* v. *Taxpayers* (1957), 49 Wn. (2d) 781, 307 P. (2d) 567), *i.e.*, that the Federal government may not

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[2] In chronological reverse order the decisions are: *City of Tacoma* v. *Taxpayers* (1962), 160 Wash. Dec. 64, 371 P. (2d) 938 (our third Cowlitz case); *City of Tacoma* v. *Taxpayers* (1958), 357 U.S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209; *City of Tacoma* v. *Taxpayers* (1957), 49 Wn. (2d) 781, 307 P. (2d) 567 (our second Cowlitz case); *City of Tacoma* v. *Taxpayers* (1953), 43 Wn. (2d) 468, 262 P. (2d) 214 (our first Cowlitz case); *State of Washington Department of Game* v. *Federal Power Commission* (1953), 207 F. (2d) 391 (C.A. 9th).

confer powers upon local units of government created by the state beyond the capacity given them by their creator. The Supreme Court of the United States reversed our decision in that case on the basis of res judicata, stating that the state of Washington and its citizens were foreclosed by the judgment in the Court of Appeals (*State of Washington Department of Game* v. *Federal Power Commission* (1953), 207 F. (2d) 391 (C.A. 9th)), from litigating further the power and authority of the city of Tacoma to proceed under its Federal Power Commission license to build dams. (In the present case, it is urged that the federal government, through the Federal Power Commission, may confer upon the city of Seattle, through its license, powers which the city was expressly prohibited by state statute from exercising at the time it made its application for a license to proceed with the Boundary project.)

The city of Seattle's power of eminent domain has been at all times, since the effective date of RCW 35.84.030, *i.e.*, 1933, subject to the prohibition set forth in that act (heretofore quoted in note 1). This is clearly a declaration of the public policy of the state, dating back thirty years, and is in no sense an attempt to exercise a veto over said project.

Whether the Federal Power Commission can confer powers of condemnation on cities which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine. If the city of Seattle could accept such a license only subject to an existing express statutory prohibition, which precluded its condemnation of P.U.D. property of the character described in RCW 35.84.030, then it is indisputable that a controversy exists which must be determined in accordance with the law of the state of Washington; and neither the Federal Power Commission nor the federal courts can make a conclusive determination on that point. That controversy is whether the property of the P.U.D., which the city of Seattle con-

cedes it intends to condemn, is within the statutory prohibition, *i.e.*, is an "electric power and light plant or electric system, or any part thereof." We are here concerned with the interpretation and application of state law, and our courts should not hesitate to proceed with that interpretation and application.

We, therefore, set aside the summary judgment of dismissal, and direct the trial court to proceed with the determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an "electric power and light plant or electric system, or any part thereof." If it is not, the action should be dismissed and the city left free to proceed to exercise its power of condemnation. If it is, we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the property by negotiation and proceed under its license; and it should not be precluded from so doing.

HILL, J.

WE CONCUR:

WEAVER, J.

ROSELLINI, J.

OTT, J.

FOSTER, J.

HUNTER, J.

DONWORTH, J. (dissenting)—In order to understand the principal issue involved in this case it is necessary to state the history of the dispute rather fully. The principal litigants are the city of Seattle (herein called the city), which desires to construct a dam on the Pend Oreille River, a navigable stream in northeastern Washington, for the development of a hydroelectric project (referred

to as the Boundary project) and Public Utility District No. 1 of Pend Oreille County (herein referred to as the P.U.D.), which desires to develop a hydroelectric project on land owned by it on the same river at Z Canyon, which is about a mile upstream from the location of the city's proposed dam.

A brief chronological statement of proceedings material to our consideration of this case follows:

October, 1953—The city applied to the Federal Power Commission (herein called the F.P.C.) for a preliminary permit for the hydroelectric project above referred to (designated as Project No. 2144). Notice thereof was duly published.

January, 1954—The P.U.D. timely filed with the F.P.C. a petition in intervention in opposition to the issuance of the preliminary permit on several grounds, including the contention that RCW 35.84.030 was an absolute prohibition against the condemnation by the city of the P.U.D.'s property. This petition to intervene was granted February 5, 1954. No other person petitioned to intervene in this proceeding.

August 30, 1954—A three-year preliminary permit was issued to the city.

July 29, 1957—The city filed an application for a license to construct the proposed Boundary dam. Notice thereof was duly published.

August, 1957—The P.U.D. again petitioned the F.P.C. for leave to intervene, raising the contention that, for the reason stated above, RCW 35.84.030 prevented the city from performing under a license, if granted. Permission to intervene was granted October 7, 1957.

September 5, 1958—The P.U.D. filed an application for a license to construct a dam on the Pend Oreille River about a mile upstream from the location of the city's

proposed dam. The P.U.D.'s project was designated as Project No. 2250. The city's petition to intervene in this proceeding was granted.

October 20, 1958—The F.P.C. entered an order consolidating both projects for hearing. Since these two projects overlapped to such an extent that a license could not be granted to each applicant, the F.P.C., under § 7(a) of the Federal Power Act, was required to decide which project (if either) complied with the criteria prescribed by the act for the development of the Pend Oreille River.

December 1, 1958—The P.U.D. moved for the dismissal of the city's application for a license regarding Project No. 2144 on the ground that the city was without legal capacity to apply for or receive such license because "the laws of the State of Washington expressly prohibit Seattle from acquiring such properties of the District by condemnation." This motion to dismiss was passed for consideration until after the hearing on the merits.

January 15, 1959 to February 23, 1960—Hearings were held from time to time before an examiner at which testimony and documentary evidence were received as to the merits of the two projects. In the city's brief in this court it is stated that these hearings consumed 126 days and produced a transcript consisting of 17,228 pages, and that some 450 exhibits were introduced in evidence at the hearings.

March 10, 1961—The examiner who presided at the consolidated hearings filed his decision in which he denied the P.U.D.'s motion to dismiss the city's application for a license (based on RCW 35.84.030) and recommended that a license be issued to the city for Project No. 2144. The examiner's decision included the following statement:

> "It is further concluded that upon the conditions set out in the order issued herewith, the project proposed by the City of Seattle for construction, maintenance and operation at the Boundary site on the

> Pend Oreille River is best adapted to a comprehensive plan for improving and developing the reach of the Pend Oreille River between Project No. 2042 [Box Canyon dam owned and operated by PUD][1] and the United States-Canadian border."

The examiner further stated that the P.U.D. had failed to produce probative and convincing evidence that there was, or in the near future would be, a market for a substantial portion of the electric power which would be produced by Project No. 2250.

The P.U.D. filed objections to the examiner's decision and included its argument that the city could not perform under its license (if issued) because of RCW 35.84.030.

July 10, 1961—After oral argument before the members of the F.P.C., the Commission issued its order granting a license to the city for Project No. 2144 and dismissing the P.U.D.'s application for a license for Project No. 2250. The Commission adopted the examiner's decision (as modified by its order) as the decision of the Commission. Its decision included the following findings:

> "(4) Seattle is a municipality within the meaning of Section 3(7) of the Act, and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a license for Project No. 2144."

August 8, 1961—The P.U.D. filed with the Commission a petiton for rehearing, again raising the question of the

[1] The Box Canyon Dam (Project No. 2042) is located on the Pend Oreille River about fifteen miles upstream from the site of the proposed Z Canyon dam (Project No. 2250), for the construction of which the P.U.D. was seeking a license from the F.P.C. and for which its application was dismissed by the Commission's order of July 10, 1961. The Box Canyon dam was involved in *State ex rel. P.U.D. No. 1* v. *Schaub*, 40 Wn. (2d) 814, 246 P. (2d) 1081 (1952).

city's inability to condemn its property because of RCW 35.84.030.

September 6, 1961—This petition for rehearing was denied by further opinion and order of the Commission. Concerning the power of the city to condemn the P.U.D.'s property and the city's compliance with § 9(b) of the Federal Power Act, the Commission said:

> "PUD contends that the Commission erred in adopting the examiner's discussion and disposition of the issue as to whether Seattle has power to acquire by condemnation lands belonging to PUD and necessary for Seattle to effect the purposes of the license issued to it. The examiner denied PUD's motion to dismiss Seattle's application because of its inability to comply with the requirements of Section 9(b) of the Federal Power Act, and concluded that should Seattle receive a license, its power to acquire the properties in question is clear under *City of Tacoma* v. *Taxpayers*, 357 U. S. 320.
>
> "PUD takes the position that Seattle is powerless to acquire PUD's lands by reason of a specific prohibition in Section 35.84.30 [.030] of the Revised Code of Washington (1951); that Seattle cannot qualify as an applicant for a license because of its inability to show compliance with the requirements of state law as required by Section 9(b) of the Federal Power Act; and that the Washington statute's restriction on Seattle's capacity to condemn PUD's properties is an impediment to Seattle's exercise of the right granted to a licensee by Congress in Section 21 of the Federal Power Act to acquire necessary properties by eminent domain in the federal courts. We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power

of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99; *City of Tacoma* v. *Taxpayers, supra; First Iowa Hydro-Electric Cooperative* v. *F.P.C.*, 328 U. S. 152; *State of Washington Department of Game* v. *FPC*, 207 F. (2d) 391, cert. den. 347 U. S. 936. And as we found in our order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license."

It should be noted that the Commission did *not* decide whether or not the city was prohibited by RCW 35.84.030 from acquiring the P.U.D.'s properties by condemnation because, even if it were so prohibited, the city could exercise the power of eminent domain under § 21 of the Federal Power Act, which reads as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the

State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.00." 16 U.S.C. § 814.

September 26, 1961—The P.U.D. filed a petition with the United States Court of Appeals for the District of Columbia to review and set aside the orders of the Federal Power Commission above referred to. In its petition for review, one of the grounds for relief is stated as follows:

"(6) The Commission erred in concluding that Seattle has complied with Section 9(b) of the Federal Power Act, 16 U.S.C. § 802(b), which requires an applicant to submit satisfactory evidence of compliance with the laws of the state within which the project is located with respect to bed and banks of the river. The Commission erroneously concluded also that it need not decide whether the laws of Washington prohibit condemnation of the PUD's properties, on the basis of the case of *City of Tacoma* v. *Taxpayers*, 357 U. S. 320 and other cases it cited. The cases cited, for numerous reasons, are both noncontrolling and inapplicable. Moreover, these cases related to state laws forbidding a dam in a navigable stream instead of a law prohibiting the use of the power of condemnation by municipal corporations, one against the other, which makes no reference to a river. The Commission erroneously concluded that, even though it be assumed Seattle is incapacitated by state law from condemning PUD's properties, nevertheless Seattle has a right to acquire these properties by exercising the power of eminent domain under Section 21 of the Federal Power Act, 16 U.S.C. § 814. The Commission erroneously concluded that *City of Tacoma* v. *Taxpayers*, 357 U. S. 320, and the other

cases it cited, established that in the exercise of the eminent domain powers of Section 21 of the Federal Power Act, 16 U.S.C. § 814, Seattle could override the state's laws specifically limiting the intrastate relationship between a city and a public utility district. In these respects the Commission misinterpreted the Federal Power Act and its orders are in conflict with fundamental principles of law governing the division of authority under our Constitution between the state governments and the Federal Government. In addition, the Commission erred in failing and refusing to consider and to give proper weight, in the application of the Federal Power Act, to the policy expressed by the Washington statute which deprives Seattle of capacity to condemn PUD's properties."

The city's motion for permission to intervene was granted by the court of appeals. This cause (No. 16,653) was argued by both the P.U.D. and the city on May 7, 1962. As yet, no decision has been announced. Thus, the controversy is now resting in the bosom of the only court in the land that has competent jurisdiction to decide it. *City of Tacoma* v. *Taxpayers*, 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209.

It was stated by counsel at the oral argument in this court that the court of appeals had been requested by the P.U.D. to withhold its decision pending the final decision of this court construing RCW 35.84.030 with respect to the power of the city to condemn the P.U.D.'s property. The court of appeals has not indicated whether it will comply with this suggestion.

The case at bar was instituted on November 30, 1961, by a taxpayer and customer of the Seattle lighting department against the city for a declaratory judgment construing RCW 35.84.030. The P.U.D. was permitted to intervene in the trial court and contended that the statute should be construed as forbidding the city to condemn its

property. Whether the original plaintiff had standing to maintain a declaratory judgment action under the circumstances described above, it is not necessary to decide.

We have before us the same two adversary litigants (the P.U.D. and the city) who vigorously argued the merits of the question of the city's power (or lack of power) to condemn the P.U.D.'s property both before the Federal Power Commission and the court of appeals. At that time, there was no decision of this court construing RCW 35.84.030, and, of course, there still is none. The F.P.C. ruled that there was no necessity to consider RCW 35.84.030 at all because the city had authority to condemn the P.U.D. property under § 21 of the Federal Power Act quoted above.

The question before us is whether the trial court erred in holding that it had no jurisdiction to decide the same dispute which had been submitted to, and (for the reason just mentioned) was *not* decided by, the Federal Power Commission (and was then pending before the Court of Appeals). The hearing before the trial court was held on January 8, and 9, 1962.

As appellants contend, there is no doubt that, as a general proposition, a municipality is a creature which owes its existence and its power to function to state statutes and that it has only the powers vested in it by the legislature.

Neither is there any doubt concerning appellants' further contention that the interpretation of a statute by the highest court of the state with respect to a particular state of facts is binding on all Federal courts.

The determinative question is whether the Federal Power Commission has jurisdiction to issue a license when, in compliance with § 9(b) of the Federal Power Act, it has made a finding that the applicant has complied with the requirements of the laws of the state

with respect to the right to engage in the business of developing, transmitting, and distributing, and any other business necessary to effect the purposes of the license.

Having made such finding, the F.P.C. has power to proceed as it did under the act, unless the court of appeals upon review decides otherwise.

As I view the problem, it was so held by the Supreme Court of the United States in 1946, when it decided the case of *First Iowa Hydro Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.

Even if the F.P.C. had passed on the applicability of RCW 35.84.030, the majority of the Supreme Court in the *First Iowa* case, *supra*, held that, under § 9(b) of the Federal Power Act, the Commission had jurisdiction to make a finding that the applicant had complied with all applicable state laws, even in the absence of state court decisions interpreting state statutes.

This is pointed up by the dissenting opinion of Mr. Justice Frankfurter, who differed with the majority on this one point. He said:

> "We are all agreed that Congress has the constitutional power to promote a comprehensive development of the nation's water resources and that it has exercised its authority by the Federal Power Act. 41 Stat. 1063, 49 Stat. 838; 16 U.S.C. §§ 791(a) *et seq.* See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. And in view of Congress' power, of course this enactment overrides all State legislation in conflict with it. But the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called 'States' rights' are

to be read into what Congress has written. It does mean that we must adhere to the express Congressional mandate that the public interest which underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located. By § 9(b) of the Act, 41 Stat. 1063, 1068; 16 U.S.C. § 802(b), Congress explicitly required that before the Commission can issue a license for the construction of a hydro-electric development, such as the proposed project of the petitioner, the Commission must have 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State' in reference to the matters enumerated.

"Whether the Commission has such 'satisfactory evidence' necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

"To safeguard the interests of the States thus protected by § 9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. § 4(f), 49 Stat. 838, 841; 16 U.S.C. § 797(f). If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and a State cannot thereafter challenge the Commission's determination. But a real

problem in administration is presented to the Power Commission when a State does intervene and claims that the applicant has not complied with its lawful requirements. For, before the Commission can meet the duty placed on it by § 9(b), it must ascertain the scope and meaning of the State law. Suppose the State law is not clear or is susceptible of different constructions and has received no construction by the only authoritative source for the interpretation of State laws, namely, the highest court of the State. Must the Federal Power Commission give an independent interpretation of the laws of the State? This is not to suggest an unreal or hypothetical situation. The Federal Power Commission submitted here a compilation of laws relating to State requirements relevant under § 9 (b) for not less than thirty States. Are the lawyers of the Commission to make themselves the originating 'interpreters of the laws of these States.' Are they to construe, for instance, the laws of New Jersey and Oklahoma and Arizona and Illinois when the courts of those States have not spoken? And if they do and the State appeals from the decision, must the Court of Appeals for the District of Columbia become the interpreter of these various laws? Finally, in the event of a further appellate review is this Court to construe State legislation without guidance by the State courts? Time out of mind, and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation. See, e.g. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-209; Brandeis, J., dissenting, in *Railroad Comm'n* v. *Los Angeles R. Co.*, 280 U. S. 145, 158, 164-66. It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the meaning of local law: "In one brought up within it, varying emphasis, tacit assumptions, unwritten presence, a thousand influences

> gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.' *Diaz* v. *Gonzales*, 261 U. S. 102, 106. If it has been deemed unwise to throw upon this Court the burden of construing local legislation when the construction could by appropriate procedure be had from the States, it seems odd that we should reject this as a rule of administration adopted by the Power Commission."

It is to be noted that the majority of the Supreme Court did not think that § 9(b) required the Commission to wait until the state courts interpreted the meaning of state laws bearing on the question of the applicant's compliance therewith.

The majority opinion in the present case attempts to distinguish the three *Tacoma* cases cited in footnote 2 on the ground that the decision of the United States Supreme Court (357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209) was based solely on the doctrine of *res judicata* regarding the decision of the court of appeals (267 F. (2d) 391). Generally speaking, that is true. But the Supreme Court actually went further and held that the Federal Power Commission's finding (No. 53), to the effect that the applicant (city of Tacoma) had submitted satisfactory evidence of compliance with all state laws insofar as necessary to effectuate the purposes of the project, was, after being approved by the court of appeals (and *certiorari* denied by the Supreme Court), binding on the parties involved. See 357 U. S., pp. 334-337.

In this case, the Federal Power Commission decided that it was not necessary to pass on the meaning or validity of RCW 35.84.030 because the city had power, under § 21 of the Federal Power Act (above quoted), to condemn the necessary properties of the P.U.D. The jurisdiction of the court of appeals has been invoked to review that decision.

As pointed out by the United States Supreme Court in the *Tacoma* case, *supra*, the court of appeals has *exclusive* jurisdiction to affirm, set aside, or modify, in whole or in part, orders of the Federal Power Commission. That court now has under consideration the question of the correctness and validity of the finding above quoted.

Until that court renders its decision or stays its hand pending the final decision of this court (if it so elects), no other court in the land, state or Federal, has jurisdiction of the issue presented to the trial court in this case.

In the interest of brevity, reference is made to the concurring opinion in the most recent *Tacoma* case (160 Wash. Dec. 64) at page 71 *et seq.*, and the authorities cited therein. It is recognized that in that case Initiative No. 25 was not enacted until many years after the Federal Power Commission had issued, and the city of Tacoma had accepted, a license for the project, while in this case the statute claimed to be prohibitory had been on the books for over twenty-five years prior thereto. However, the question of jurisdiction is settled by the *First Iowa* case and the *Tacoma* case referred to above.

Because the F.P.C. did not find it necessary to decide the question urged upon us by appellants and for the further reason that the court of appeals has exclusive jurisdiction of the controversy, it is my opinion that the trial court correctly held that it had no jurisdiction of the controversy, and its judgment dismissing the action should be affirmed.

DONWORTH, J.

I concur. HAMILTON, J.

The logic or reasoning of the dissent written by Judge Donworth is *in my opinion* unanswerable and it follows that remanding this matter for further proceedings in the trial court is a fruitless act; consequently I concur in the dissent.

FINLEY, C. J.

APPENDIX D

Opinion of the Supreme Court of Washington of October 2, 1962 (60 Wn. 2d 852, 375 P. 2d 256 (1962))

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36486

EN BANC

ROBERT R. BEEZER, *Appellant*,

v.

THE CITY OF SEATTLE, GORDON S. CLINTON, as Mayor of said City, and M. B. MITCHELL, DAVID LEVINE, CHARLES M. CARROLL, CLARENCE F. MASSART, J. D. BRAMAN, MYRTLE S. EDWARDS, FLOYD C. MILLER, BOB JONES and PAUL J. ALEXANDER, as the duly constituted Council of the City of Seattle, *Respondents*,

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellant*.

Filed Oct. 2, 1962

PER CURIAM.—This matter comes before us on a motion to dismiss the appeal in this case.

The appeal was argued before this court Thursday, June 14, 1962, and appears in our Advance Sheets of August 3, 1962 (Vol. 160 Wash. Dec. 241, 373 P. (2d) 796).

The city of Seattle filed a timely petition for rehearing, which stayed the going down of the remittitur until we disposed of the petition. While the petition was under consideration, the city of Seattle moved to dismiss the appeal on the basis of the opinion of the United States Court of Appeals for the District of Columbia Circuit, in cause No. 16,653, *Public Utility District No. 1 of Pend Oreille, Washington, Petitioner*, v. *Federal Power Commission, Respondent, the City of Seattle, Intervenor*, 308 F. (2d) 318, affirming an order of the commission.

It is the contention of the city that this decision of the circuit court is res judicata of the issues raised on this appeal and renders the appeal moot.

We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington.

The motion to dismiss the appeal is denied.

DONWORTH, J. (dissenting)—The decision of the United States Court of Appeals for the District of Columbia, *Public Utility District No. 1 of Pend Oreille, Washington, Petitioner,* v. *Federal Power Commission, Respondent, The City of Seattle, Intervenor,* filed August 30, 1962, 308 F. (2d) 318, held that there was no need to decide the only question involved in the present case because the City of Seattle had authority under § 21 of the Federal Power Act, 16 U.S.C.A. § 814, to condemn the property of the public utility district.

The result of the above majority opinion is to remand the present case to the trial court for the trial of an issue of fact which is now immaterial. It could become material only if the United States Supreme Court should (a) grant the public utility district's proposed petition for certiorari and (b) subsequently reverse the decision of the Court of Appeals. None of the parties are seeking a stay of proceedings in this case until the United States Supreme Court disposes of that case.

For the reasons stated in the dissenting opinions in the instant case (*Beezer* v. *Seattle*, 160 Wash. Dec. 241, 373 P. (2d) 796), the remand of this case at this time is a useless act and will impose on the litigants unnecessary labor and expense.

Assuming that the pending petition for rehearing in this court will be denied, I would grant the city's motion to dismiss the appeal.

DONWORTH, J.

We concur in this dissent:

FINLEY, C. J.

HAMILTON, J.

APPENDIX E

Statutes Involved

Section 313(b), 16 U.S.C. § 825*l*(b), of the Federal Power Act provides as follows:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

Section 21 of the Federal Power Act, 16 U.S.C. § 814, provides as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the Commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such lands or other property may be located, or in the State courts. . . ."

Section 35.84.030 of the Revised Code of Washington provides:

"Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, that no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization or by a public utility district."

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement of the case	4
The hydroelectric project	4
The prior license proceedings	5
The State court injunction proceedings	7
The present mandamus proceeding	9
The questions are substantial	10
Conclusion	16
Appendix	17

CITATIONS

Cases:

Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8	13
Beezer v. *City of Seattle*, 60 Wash. 2d 239	2, 8
Beezer v. *City of Seattle*, 60 Wash. 2d 652	2, 8
Detroit & Mackinac Ry. Co. v. *Michigan Railroad Commission*, 240 U.S. 564	13
First Iowa Hydro-Electric Co-op. v. *Federal Power Commission*, 328 U.S. 152	16
Local No. 438 v. *Curry*, 371 U.S. 542	10, 11, 12
Madruga v. *Superior Court*, 346 U.S. 556	13
Mercantile National Bank v. *Langdeau*, 371 U.S. 555	11
Michigan Central Railroad Co. v. *Mix*, 278 U.S. 492	13
Mt. Vernon-Woodbery Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U.S. 30	13

716-746—63——1

Cases—Continued

	Page
Pacific Coast Dairy v. *Department of Agriculture of California*, 318 U.S. 285	12–13
Pan American Petroleum Corp. v. *Superior Court*, 366 U.S. 656	13
Public Utility District No. 1 of Pend Oreille County v. *Federal Power Commission*, 308 F. 2d 318, certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871	2, 6, 7, 9, 16
Seattle, City of, 26 FPC 54	2
Seattle, City of, 29 FPC 1098	5
St. Louis, B. & M. Ry. Co. v. *Taylor*, 266 U.S. 200	13
State ex rel. Pryor v. *Paul*, 5 Wn. 2d 90	13
Tacoma, City of, 21 FPC 41	12
Tacoma, City of v. *Taxpayers of Tacoma*, 357 U.S. 320	10, 14, 15, 16
State of Washington Department of Game v. *Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U.S. 936	16
Weston v. *Charleston*, 2 Pet. 449	13

Statutes:

Federal Water Power Act (Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791–823) as amended, including amendments by Title II of the Public Utility Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a–825r):	
Sec. 4(f), 16 U.S.C. 797	15
Sec. 13, 16 U.S.C. 806	11, 12
Sec. 21, 16 U.S.C. 814	3, 4, 6, 9, 10, 14, 15, 16
Sec. 308(a), 16 U.S.C. 825(g)	14
Sec. 313(b), 16 U.S.C. 825l	6, 10, 12, 14

Statutes—Continued Page
28 U.S.C. 1257 10
28 U.S.C. 2103 3
Washington Constitution, Art. IV, Sec. 4 2
Revised Code of Washington:
Sec. 2.04.010 2
Sec. 7.16.160 2
Sec. 35.84.030 ..... 3, 5, 6, 8, 15
Miscellaneous:
Federal Power Commission, Forty-Second Annual Report (1962) 5
Feigenbaum, *Interlocutory Appellate Review Via Extraordinary Writ*, 36 Washington L. Rev. 1 (1961) 13

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 677

THE CITY OF SEATTLE, ET AL., APPELLANTS

v.

ROBERT R. BEEZER, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM OF THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

This is an appeal from a decree of mandamus entered by the Supreme Court of the State of Washington on October 7, 1963, directing the Superior Court for King County, Washington, to exercise jurisdiction over a suit to relitigate issues decided by a license order of the Federal Power Commission and affirmed on review by a Federal court of appeals. The Solicitor General, on behalf of the Federal Power Commission, submits this memorandum, *amicus curiae*, in support of appellants.

OPINION BELOW

The opinion of the Supreme Court of Washington, issued on July 18, 1963, is reported at 162 Wash.

Dec. 559, 383 P. 2d 895, and reproduced in Appendix A to appellants' Jurisdictional Statement. Related earlier opinions of the Supreme Court of Washington are reported at 60 Wash. 2d 239, 373 P. 2d 796 (July 12, 1962) and 60 Wash. 2d 652, 375 P. 2d 256 (October 2, 1962). These two opinions appear as Appendices C and D, respectively, to the Jurisdictional Statement. The opinions of the Federal Power Commission and its examiner are reported as *City of Seattle* at 26 FPC 54, 61, 463, and the opinion of the Court of Appeals is reported as *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission,* 308 F. 2d 318 (C.A.D.C.)[1]

JURISDICTION

The mandamus proceeding below was initiated before the Supreme Court of the State of Washington pursuant to Article IV, Section 4 of the Washington Constitution and two State statutes (Revised Code of Washington 2.04.010 and Revised Code of Washington 7.16.160) as a means of determining the jurisdiction of the Washington trial court. The decree issuing the peremptory writ of mandamus was entered on October 7, 1963, simultaneously with the order denying rehearing. Appellants filed the notice of appeal in this case in the Supreme Court of the State of Washington on November 4, 1963.

Cases supporting the conclusion that the judgment of the State Supreme Court is final are discussed at pp. 10–13, *infra.* Although jurisdiction on

[1] Certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871.

appeal may be doubtful, this Court may treat the papers as a petition for a writ of certiorari. 28 U.S.C. 2103.

QUESTION PRESENTED

The Federal Power Commission issued a hydroelectric project license to the City of Seattle in preference to a rival applicant, Public Utility District No. 1 of Pend Oreille County (PUD). PUD had argued before the Commission that a State statute (Revised Code of Washington 35.84.030) prohibits condemnation by Seattle of lands owned by PUD which are essential for the exercise of the Federal license. In sustaining Seattle's claim, the Commission held, at the threshhold, that Section 21 of the Federal Power Act grants the power of eminent domain to a licensee and cures whatever incapacity there might otherwise be under State law. PUD appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed, also holding that Seattle has power of eminent domain power under the Federal Act. This Court denied certiorari. The following question is presented:

Whether, in a suit brought by a taxpayer of Seattle and supported by PUD, the Washington courts may now reexamine the holdings of the Federal Power Commission and of the United States Court of Appeals that Seattle has a power of condemnation conferred by federal law which is not subject to any limitations on condemnation imposed by State law.

STATUTES INVOLVED

The relevant State and federal statutes are set forth in the Appendix, *infra* pp. 17–18.

STATEMENT OF THE CASE

This is the latest episode in litigation beginning in 1953 and involving several separate legal and administrative proceedings arising out of the plan of the City of Seattle to construct a power project on the Pend Oreille River. The first proceeding, recently concluded by this Court's denial of certiorari, involved the competing and mutually exclusive applications of the City of Seattle and of Public Utility District No. 1 of Pend Oreille County, Washington (PUD), for Federal Power Commission licenses. The Commission awarded a license to Seattle and, on appeal by PUD, the United States Court of Appeals for the District of Columbia Circuit affirmed.

A second proceeding involves Seattle's pending suit to condemn certain lands owned by PUD, initiated in the United States District Court for the Eastern District of Washington pursuant to Section 21 of the Federal Power Act.

The present case arises out of two actions in the State courts by a taxpayer of Seattle, supported by PUD, to block Seattle's exercise of its federal license on the ground that Seattle may not condemn PUD's lands—a matter resolved in Seattle's favor in the first proceeding.

The hydroelectric project.—The Pend Oreille River is a navigable water of the United States, tributary to the Columbia River. The hydroelectric project which the Commission licensed as best adapted to the comprehensive development of this water will have an initial capacity of 840,000 horsepower and provision for an ultimate capacity of 1,260,000 horse-

power. 26 FPC at 142.[2] In terms of ultimate capacity, the project (No. 2144) is the fifth largest ever licensed by the Commission. Federal Power Commission, Forty-second Annual Report, pp. 135–140. The licensee, City of Seattle, is a municipal corporation in the State of Washington which commenced electric utility operations in 1905 and has become the second largest municipal utility in the United States. 26 FPC at 93. Seattle's unsucessful rival for the license, PUD, is also a municipal corporation in the State of Washington. PUD owns shorelands of the Pend Oreille River which must be flooded as a result of constructing Seattle's project.

The prior license proceedings.—Seattle applied to the Federal Power Commission for a preliminary permit and, later, for a license. PUD was permitted to intervene. It urged, *inter alia,* that Revised Code of Washington 35.84.030 prohibited the condemnation by Seattle of the property belonging to PUD and essential to the project. After lengthy administrative hearings, the presiding examiner found that the PUD shorelands were indispensable to Seattle's project and that Seattle could not acquire them without resort to condemnation; but he concluded that Seattle would have power under federal law to condemn them, notwithstanding any State prohibition, if it were issued a license. 26 FPC at 65.

[2] As originally issued, the license provided for six initial generating units and three future additions of 90,000 kilowatts each. The license has been slightly revised to provide for four initial and two additional units of 137,750 kilowatts each. 29 FPC 1098.

716-746—63——2

On exceptions to the examiner's decision PUD again raised the issue (26 FPC at 55) whether "by reason of the laws of the State of Washington, Seattle is unable to acquire the lands necessary for it to effect the purposes of the license issued to it."

The full Commission affirmed the examiner and, when PUD renewed its contention in applying for rehearing, held (26 FPC at 466):

> * * * We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. * * * And as we found in [our] order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license.

PUD sought review in the Court of Appeals pursuant to Section 313(b) of the Federal Power Act. Again, it raised the question whether the limiting provision of RCW 35.84.030 could prevent Seattle from exercising the right of condemnation conferred by Section 21 of the Federal Power Act. The Court of Appeals held that "the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute." *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. 2d 318, 323.

PUD petitioned for a writ of certiorari from the decision of the Court of Appeals. This Court denied certiorari (372 U.S. 908), rehearing (372 U.S. 956), and leave to file a second petition for rehearing (375 U.S. 871).

The State court injunction proceedings.—On November 29, 1961—soon after the Commission had issued a license to the City of Seattle—one Beezer, a taxpayer of Seattle, instituted a suit in the Superior Court for the State of Washington for King County for an injunction against expenditure of funds "in connection with the license granted the City of Seattle by the Federal Power Commission and any proposed condemnation proceedings." R. 0007. The complaint recognized that Seattle was acting pursuant to the federal license in making plans to condemn PUD's properties (R. 0005), but urged that the City's plans conflicted with State law. The complaint also noted the pendency of a petition to review the license order in the United States Court of Appeals (R. 0004). PUD promptly filed its own complaint in intervention (R. 0016–0030) in the State court proceeding.

Seattle's answer (filed December 18, 1961; R. 0031–0035), amended answer (filed December 21, 1961; R. 0036–0039), and motion for summary judgment (filed December 22, 1961; R. 0054–0055) pleaded that maintenance of the Beezer-PUD suit constituted an impermissible collateral attack upon the orders of the Federal Power Commission which were currently under review before the federal court. After argument, the State trial court granted Seattle's motion for summary judgment, holding both that the Federal con-

demnation statute superseded the State law and that the Beezer-PUD suit was an impermissible collateral attack upon the Commission's licensing orders. Beezer and PUD appealed to the Supreme Court of Washington, which, on July 12, 1962, set aside the summary judgment of dismissal, holding that the applicability of the Revised Code of Washington 35.84.030 was properly in issue before the Superior Court. 60 Wash. 2d 239, 373 P. 2d 796 (J. S. Appendix C.). Three Justices dissented on the ground that exclusive jurisdiction to revise the Federal Power Commission's determination resided in the federal courts.

The appeal was still pending before the Washington court on a timely petition for rehearing when, on August 30, 1962, the Court of Appeals ruled that Seattle, as a federal licensee, would have power to condemn the shorelands in question irrespective of State law. Accordingly, Seattle moved in the Washington Supreme Court to dismiss the appeal on grounds of mootness and *res judicata*. R. 0074. On October 2, 1962, that court denied the motion. 60 Wash. 2d 652, 375 P. 2d 256 (J.S. Appendix D). The majority reasoned that the judgment of the Court of Appeals was not binding on PUD because certiorari might yet be sought.[3] Three Justices dissented.

On November 20, 1962, the case was remanded. Before the Superior Court proceeded with the trial, this

[3] It appears (R. 0086–0087) that in answer to Seattle's motion to dismiss the appeal Beezer conceded that if this Court denied certiorari, then "admittedly the state court case will be both 'moot' and '*res judicata*', and no inconsistent decision would be possible."

Court denied PUD's petitions for certiorari (372 U.S. 908, February 18, 1963) and rehearing (372 U.S. 956, March 25, 1963). Seattle thereupon moved to dismiss the action in the Superior Court (R. 0085) and, after argument on April 11, 1963, that court indicated that it would dismiss because it was "without any jurisdiction to proceed". R. 0093; Petition for Mandamus, Ex. C. However, the trial judge withheld entry of judgment to permit Beezer to seek an original writ of mandamus from the Washington Supreme Court, a procedure which appears to be more expeditious than appeal from a dismissal.

The present mandamus proceeding.—On April 18, 1963, Beezer (again joined by PUD) filed a petition for writ of mandamus in the Supreme Court of Washington. R. 0078–0099. On July 18, 1963, the State Supreme Court issued its opinion granting the petition. R. 0102–0112, 162 Wash. 559, 383 P. 2d 895 (J. S. Appendix A). It refused to accept the then-concluded federal litigation involving PUD and Seattle as the law of the case because the technical requirements of *res judicata* were not fulfilled. It also declined, in the absence of a decision on the merits by this Court, to accept the Superior Court's alternative ground of decision—that a determination as to the scope and application of State law was pointless because the eminent domain powers of a federal licensee under Section 21 are not limited by State prohibitions against condemnation. It concluded (four Justices dissenting) that the Superior Court had jurisdiction and should proceed to trial on the

question of whether State law prohibited condemnation of PUD's properties by Seattle.

On October 7, 1963, the Washington court denied rehearing, entered judgment, and issued a peremptory writ of mandamus declaring that the Superior Court "has full and complete jurisdiction to proceed with the trial" and ordering it to do so. R. 0115.

THE QUESTIONS ARE SUBSTANTIAL

Under Section 313(b) of the Federal Power Act, as construed by this Court in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, the exclusive judicial forum with authority to rule upon the federal licensee's capacity to condemn the property of PUD—a question which had previously been decided by the Federal Power Commission—was the United States Court of Appeals on review of the Commission's order. The question was litigated there by PUD; it was decided in Seattle's favor; and the decision—that the eminent domain power granted a licensee by Section 21 of the Federal Power Act may be exercised by Seattle even if the Washington statute prohibits Seattle from condemning PUD's lands—was subject to further review only in this Court. For this reason, the final judgment below, sustaining a State court's jurisdiction to reexamine the merits of this question, should be reversed.

1. The decree below is a final judgment within the meaning of 28 U.S.C. 1257. As in *Local No. 438* v. *Curry,* 371 U.S. 542, 548, the issue ripe for review is neither whether a State court has erroneously decided a matter of federal law in a case admittedly within

its jurisdiction, nor whether it is federal or State law that governs a case properly before the State courts. Under review here, as in *Curry*, is the judgment of a State court "finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain" of the federal regulatory agency. 371 U.S. at 548. This issue, in the words of *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, "is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Indeed, the appealability of the State judgment is clearer in the instant case than in *Mercantile National Bank*, for here, as in *Curry*, the maintenance of the State litigation threatens serious interference with a significant federal program. Comprehensive development of the nation's water resources requires a federally prescribed timetable which cannot be met when State court proceedings prevent the timely issuance of revenue bonds essential to finance the construction (26 FPC at 137, Finding 62).[4]

[4] Section 13 of the Federal Power Act explicitly provides for assuring the diligent construction of licensed projects and requires that the licensee "within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market." The license for this development of the Pend Oreille River requires (26 FPC at 59):

> *Article 28.* The Licensee shall commence construction of the Composite development, Project No. 2144, within one year of the effective date of this license; shall thereafter in good faith and with due diligence prosecute such construc-

To carry the point a step farther, this case calls even more strongly for review than *Curry* since there the preempting federal jurisdiction had not yet been exercised. Here, the federal tribunals, both administrative and judicial, have actually exercised the jurisdiction which Section 313(b) of the Federal Power Act makes exclusive, so that the final action of the courts which do have jurisdiction—as well as the exclusivity of that jurisdiction—calls for vindication.

The foregoing considerations would govern even if the Washington court, acting on an appeal, had reversed the trial court's dismissal for want of jurisdiction. In fact, the Washington court issued a writ of mandamus in a separate suit. This Court's jurisdiction is, therefore, also sustained by the settled rule that a special writ proceeding will ordinarily be regarded as a separate and distinct suit even though the judgment leaves some other controversy undecided. When a proceeding by way of a mandamus or a prohibition proceeding determines the jurisdiction of an inferior tribunal, the final disposition of that proceeding is a final judgment, reviewable by this Court, even if the judgment below is in favor of jurisdiction and orders (or sanctions) further proceedings in the principal suit. *Pacific Coast Dairy* v. *Depart-*

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tion; and shall complete the project and place it in operation within six years from the effective date of this license.

The Commission's timetables may only be extended "when not incompatible with the public interests" (Section 13, 16 U.S.C. 806), yet precisely the sort of litigation which the Washington court here entertains has been the source of serious delays to earlier licensed hydro-electric developments. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 330–331, 333; *City of Tacoma*, 21 FPC 41.

ment of Agriculture of California, 318 U.S. 285 (reversing the State court on the merits after requesting argument of the finality question, see 63 S. Ct. 55). As this Court has stated, *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U.S. 30, 31:

> * * * Prohibition is a distinct suit and the judgment finally disposing of it is a judgment within the meaning of the Judicial Code, * * * and by the common law. * * * *Weston* v. *Charleston,* 2 Pet. 449, 464, 465. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

See, also, *Michigan Central Railroad Co.* v. *Mix,* 278 U.S. 492, 494; *St. Louis, B. & M. Ry. Co.* v. *Taylor,* 266 U.S. 200, 206; *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission,* 240 U.S. 564, 570; *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8, 14; *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656; *Madruga* v. *Superior Court,* 346 U.S. 556, 557, n. 1.

The law of Washington provides for a separate suit in mandamus to compel a trial court to proceed with a case which it regards as beyond its jurisdiction. *State ex rel. Pryor* v. *Paul,* 5 Wash. 2d 90, 104 P. 2d 745, and cases there cited; *cf.* Feigenbaum, *Interlocutory Appellate Review Via Extraordinary Writ,* 36 Washington L. Rev. 1 (1961). The formal judgment below disposes of the mandamus suit and meets the traditional test of finality.

2. That the State courts have no jurisdiction to pass upon Seattle's powers as a licensee under the

Federal Power Act is established by this Court's holding in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320. There, as here, the Federal Power Commission found it necessary to inquire into the capacity of a Washington municipality to condemn property in order to pass upon objections to its application for a license; there, as here, the Commission and a reviewing Court of Appeals determined that Section 21 of the Federal Power Act grants a power of condemnation that is not subject to limitations imposed by State law on the condemnation powers of a municipality; there, also, this Court denied review of this issue; finally, in that case as in this one, the Washington courts sought to assert jurisdiction over an independent and subsequent suit to determine the municipal licensee's condemnation powers. With the case in that posture, this Court held in *Tacoma* that the exclusive jurisdiction to adjudicate issues determined by a Commission order is vested in the federal Courts of Appeals (and in this Court on certiorari) pursuant to the statutory review provisions of Section 313(b) of the Federal Power Act.

No adequate distinction between the two cases can be bottomed upon the fact that the State of Washington, which was held to represent its citizens (357 U.S. at 340–341), appeared before the Commission and court of appeals in *Tacoma* and chose not to appear in this case. The taxpayer, Beezer, never attempted to become a party to the Commission proceedings pursuant to Section 308(a) of the Act, 16 U.S.C. 825g(a), although he was afforded the statutory

notice required by Section 4(f), 16 U.S.C. 797(f). He cannot now collaterally attack the Commission's final order. For purposes of these proceedings, he accepted the representation of the City of Seattle. He cannot now object that the City adopted a litigating position different from that he would have chosen.

This is especially clear in the present case for even now Beezer asserts no interest which was not fully protected by the presence of the City of Seattle in the Commission proceedings. Beezer does not suggest that the proposed project is contrary to the interests of Seattle or its citizens. His sole claim is that Seattle should be enjoined from expending tax revenues in furtherance of a project which (so he alleges) it cannot complete because, in the face of Revised Code of Washington 35.84.030, it cannot acquire necessary properties from PUD. But the square holding of *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, compels the conclusion that PUD, having failed before the Commission and on review, cannot again challenge the Commission's holding sustaining Seattle's condemnation powers under Section 21 of the Federal Power Act. Because of Seattle's successful defense of its position before the Commission and court of appeals, there can be no further obstacle to its condemnation of the properties it needs. Seattle's presence before the Commission and the federal courts

fully protected its taxpayers, including Beezer, against the harm they claim to apprehend.[8]

CONCLUSION

For the foregoing reasons, review should be granted and the judgment below reversed.

Respectfully submitted.

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Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
DAVID J. BARDIN,
Attorney,
Federal Power Commission.

DECEMBER 1963.

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[8] While we believe that, just as in the *Tacoma* case, 357 U.S. 320, 334, there is no occasion for this Court to review the merits of the issues litigated before the court of appeals, we submit that the court of appeals correctly held that Section 21 of the Federal Power Act confers powers of eminent domain with respect to all properties necessary in the public interest for developing a waterway and without regard to the vagaries of State condemnation law. *Public Utility District* v. *Federal Power Commission*, 308 F. 2d 318 (C.A.D.C.), certiorari denied, 372 U.S. 908; *State of Washington Department of Game* v. *Federal Power Commission*, 207 F. 2d 391 (C.A. 9), certiorari denied, 347 U.S. 936. The guiding principles have, indeed, been established since the decision in *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 181, where the Court said that the "detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." (Footnotes omitted.)

APPENDIX

Section 35.84.030 of the Revised Code of Washington provides:

> Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided,* That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization or by a public utility district.

Section 21 of the Federal Power Act, 41 Stat. 1074, 16 U.S.C. 814, provides:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the

use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such lands or other property may be located, or in the State courts.

Section 313(b) of the Federal Power Act, 49 Stat. 860, as amended by 72 Stat. 947, 16 U.S.C. 8251(b), provides:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

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vs.

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and

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION OF ROBERT R. BEEZER TO DISMISS APPEAL

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The Appellee Robert R. Beezer moves to dismiss this appeal for want of jurisdiction on the following grounds:

1. As shown on the face of the state supreme court's opinion (162 Wash. Dec. 559; 383 P.2d 895, set forth in full in Appendix A of Appellant's Jurisdictional Statement) the case was ordered tried in the state court below to determine a question of state law. If this question of state law is determined adversely to appellees, the case is at an end. No federal question arises unless the state court on this remand has first determined the question of state law favorably to appellees. Only in that contingent event does a federal question secondarily arise.

2. Being merely a remand for trial to determine a question of state law, the judgment appealed from is

not final as required by 28 U.S.C. § 1257. *Bostwick v. Brinkerhoff,* 106 U.S. 3; *Cincinnati Street Railway Co. v. Snell,* 179 U.S. 395; Simkins Federal Practice, Third Edition, Section 962, and cases cited.

3. No substantial federal question is presented by the judgment being appealed from. Simkins, *supra,* section 967, p. 689, and cases cited.

4. The judgment appealed from rests upon an adequate non-federal ground, as shown on the face of the state supreme court's opinion. Simkins, *supra,* section 968, and cases cited.

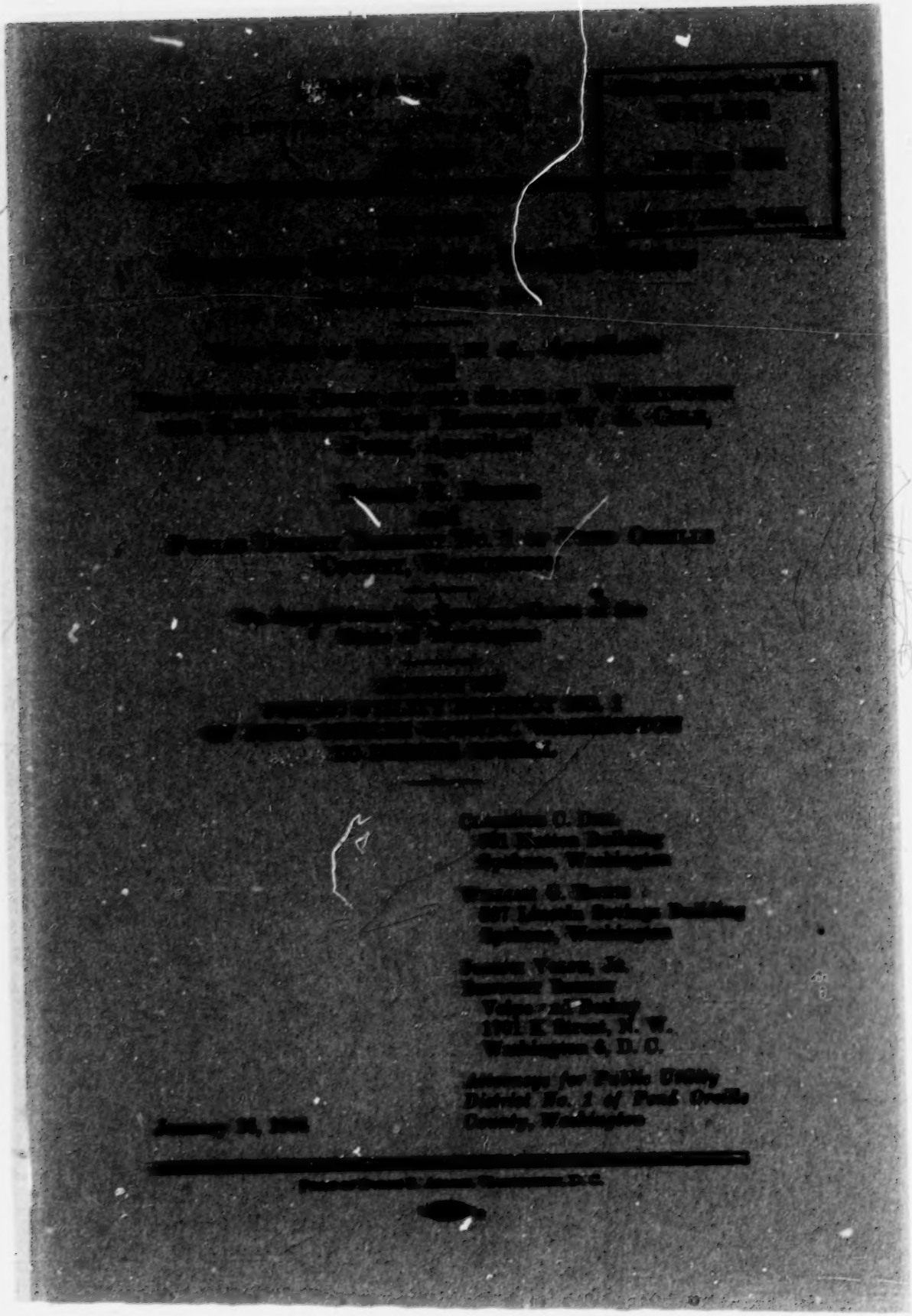
The foregoing points seem so obviously well taken under the rulings of this court, that it would seem unnecessary to ask this court to do more than to read the state court's opinion in the light of this court's decisions.

Indeed, these same points were made in opposition to the appellants' motion for a stay of the state court proceedings in the state trial court in this case. Mr. Justice Douglas denied the stay on November 9, 1963.

The appeal should be dismissed, and on the same grounds certiorari should not be entertained. See note below.

ALFRED J. SCHWEPPE
Attorney for Robert R. Beezer.

NOTE. While it has no bearing on the jurisdiction of this Court on this appeal, appellee Beezer herewith informs the Court as a fact that the cause below was tried in the trial court in November, 1963; that the trial court held that a part of the properties sought to be taken by appellant city were a part of the electrical plant or system of the P.U.D. within the meaning of the state law expressly prohibiting condemnation by a municipal corporation of P.U.D. properties. But the trial court next decided that appellant city could acquire that part by condemnation under the Federal Power Act, and has stated that it will enter a final judgment to that effect. Upon entry of judgment an appeal will be taken to the Superior Court of the State of Washington.



CONTENTS

	Page
1. No Basis Exists for an Appeal as of Right in This Case	3
2. The Judgment Being Appealed From Is Not Final	7
A. This Case Is Wholly Different From Curry and Langdeau	7
B. This Mandamus Is Not An Independent Proceeding	11
3. In Any Event, at This Interlocutory Stage of the Proceeding This Court Should Not Exercise Any Power of Review	17
4. This Appeal Has Become Moot	19
5. No Substantial Federal Question Is Presented By the Judgment Being Appealed From	20
A. Requiring That Seattle Proceed to Trial Does Not Raise a Substantial Federal Question	20
B. A Final Judgment, If Rendered Against Seattle, Will Not Contravene the Res Judicata Principles Expressed in This Court's Tacoma Decision or Elsewhere	21
C. A Final Judgment, If Rendered Against Seattle, Would Be Correct in Determining That Section 21 of the Federal Power Act Does Not Confer on Seattle a Right to Defy the Statutory Limitation on Its Charter	31
6. The Judgment Rests on an Adequate Nonfederal Ground	35
Conclusion	36
Appendix A: "Questions Presented" Portion of Seattle's Notice of Appeal to This Court	37

Page

CASES CITED

Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 20
Accardi v. Shaughnessy, 347 U.S. 260 30
Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 .. 12
Blair v. Commissioner, 300 U.S. 5 29
Bostwick v. Brinkerhoff, 106 U.S. 3 13
Brownlow v. Schwartz, 261 U.S. 216 19
Burke Motor Co. v. Lillie, 39 Wn. 2d 918, 239 P. 2d 854 (1952) 35
Castellano v. Commission of Investigation of the State of New York, 361 U.S. 7 26
Charleston Assn. v. Alderson, 324 U.S. 182 4
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 30
Cincinnati Street Railway Co. v. Snell, 179 U.S. 395 .. 13
Codlin v. Kohlhausen, 181 U.S. 151 19
Construction Laborers v. Curry, 371 U.S. 542 ....7, 8, 9, 11
Curtiss v. Crooks, 190 Wash. 43, 66 P. 2d 1140 (1937) .. 35
Dallemagne v. Moisan, 197 U.S. 169 32
Di Bella v. United States, 369 U.S. 121 14
Ditson v. California, 372 U.S. 933 20
Duke Power Co. v. Greenwood Co., 299 U.S. 259 18
Durfee v. Duke, 375 U.S. 106 30
Fay v. Noia, 372 U.S. 391 30
Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 20
First Iowa Coop. v. Power Comm'n, 328 U.S. 152 31, 32, 33, 34
Gomillion v. Lightfoot, 364 U.S. 339 33
Gotthilf v. Sills, 375 U.S. 79 14
Gratiot County State Bank v. Johnson, 249 U.S. 246. .24, 25
Hanson v. Denckla, 357 U.S. 235 4
Head v. New Mexico Board, 374 U.S. 424 6
Hendersonville etc. Co. v. Blue Ridge Ry., 243 U.S. 563 6
Hinderlider v. La Plata Co., 304 U.S. 92 24
Hunter v. Pittsburgh, 207 U.S. 161 33
Huron Cement Co. v. Detroit, 362 U.S. 440 34
Kalb v. Feuerstein, 308 U.S. 433 30
Kersh Lake Drainage Dist. v. Johnson, 309 U.S. 485 ..26, 28
Kóvacs v. Brewer, 356 U.S. 604 30
Labor Board v. Denver Bldg. Council, 341 U.S. 675 30

Page

Lawlor v. National Screen Service Corp., 349 U.S. 322 26
Liner v. Jafco, Inc. No. 43, decided January 6, 1964 .. 8
Madruga v. Superior Court, 346 U.S. 556 12
Mercantile Nat. Bank v. Langdeau, 371 U.S. 555 ..6, 7, 9, 11
Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 30
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 .. 20
Norwegian Co. v. Tariff Comm., 274 U.S. 106 19
Pacific Coast Dairy v. Dep't, 318 U.S. 285 12
Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 12
Parker v. Brown, 317 U.S. 341 34
Parr v. United States, 351 U.S. 513 20
Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 33
Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 .. 34
Petroleum Co. v. Comm'n, 304 U.S. 209 20
Power Comm'n v. Niagara Mohawk Power Co., 347 U.S. 239 34
Public Utility District No. 1 of Pend Oreille County v. Federal Power Commission, 308 F. 2d 318, certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871 (No. 611, October Term 1962) 21, 22
Radio Station WOW v. Johnson, 326 U.S. 120 16
Raley v. Ohio, 360 U.S. 423 4
Republic Gas Co. v. Oklahoma, 334 U.S. 62 15
Rescue Army v. Municipal Court, 331 U.S. 549 ..12, 17, 19, 20
Sam Fox Publishing Co. v. United States, 366 U.S. 683 24
Slagle v. Ohio, 366 U.S. 259 4
Southern Pacific Co. v. Eufrazia and Southern Pacific Co. v. Eelk, 351 U.S. 493 13
State of Washington Department of Game v. Federal Power Comm'n, 207 F. 2d 391 (9th Cir. 1953), certiorari denied, 347 U.S. 936 (No. 415 of October Term 1953) 22, 23
Sweezy v. New Hampshire, 354 U.S. 234 4
Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 ..22, 23, 26-32
Union National Bank v. Lamb, 337 U.S. 38 4
United States v. Pink, 315 U.S. 203 24
United States v. R.C.A., 358 U.S. 334 30
United States v. Stone & D. Co., 274 U.S. 225 30
United States v. Wallace & Tiernan Co., 336 U.S. 793 .. 28

Page

Vanderbilt v. Vanderbilt, 354 U.S. 416 30
Voltaggio v. Caputo, 271 U.S. 232 20
Washington v. Oregon, 297 U.S. 517 24
Western U. Tel. Co. v. Foster, 247 U.S. 105 24
Western Union Co. v. Pennsylvania, 368 U.S. 71 24
Williams v. Mayor, 289 U.S. 36 33
Yates v. United States, 354 U.S. 298 .....26, 30

OTHER AUTHORITIES

28 U.S.C. § 1257 .....2, 3, 7, 14, 16, 17
28 U.S.C. § 2103 3
Federal Power Act, Section 21, 16 U.S.C. § 814
5, 21, 28, 31, 33
Judiciary Act of 1925 6
National Banking Act, 12 U.S.C. § 94 9
Supreme Court Rule 14(1)(d) 3
Supreme Court Rule 14(2) 5
Supreme Court Rule 15(1)(c)(2) 6
Revised Code of Washington, § 35.84.030 .....3, 5, 31
Note, "Appealability in the Federal Courts", (1961)
75 Harvard L. Rev. 351 16

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v.

ROBERT R. BEEZER

and

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

On Appeal from the Supreme Court of the State of Washington

MOTION OF PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON TO DISMISS APPEAL

The appeal which is now before this Court is merely an appeal from a mandamus order directing the trial court to proceed with the trial, as previously directed. The mandamus is simply an order to carry out the Washington Supreme Court's previous direction to try

the case of the taxpayer, Beezer, against the City of Seattle, and determine whether Seattle, in defiance of a state statute, may condemn properties of a public utility district (PUD) if the evidence shows that they are electric properties which the state statute has forbidden cities to condemn.

Both Seattle and the PUD are municipal corporations of the State of Washington. They are both engaged in the electric power business. The Washington legislature passed this intrastate law to prevent a city from interfering with a public utility district's electric business and development of power resources. In short, the legislature passed this law to compel the cities of the State to let the PUD's alone.

This appeal should be dismissed, and on each of the following grounds:

(1) No basis exists for an appeal as of right in this case.

(2) The judgment being appealed from is not final, as required by 28 U.S.C. § 1257, but is an interlocutory order which does not deprive Seattle of any right Seattle holds as a licensee under the Federal Power Act.

(3) Even apart from the statutory question as to finality of judgment, the judgment being appealed from presents this state court taxpayer's suit at such an interlocutory stage that this Court should not exercise any power of review.

(4) This appeal has become moot: the trial court has already complied with the mandamus order by holding the trial; it now has rendered a decision that some of the PUD properties are electric properties within the meaning of the Washington statute but

that Seattle may nevertheless condemn them under the federal supremacy doctrine.

(5) No substantial federal question is presented by the judgment being appealed from.

(6) The judgment being appealed from rests on an adequate nonfederal basis.

In these circumstances, Seattle is not entitled to the dispensation of 28 U.S.C. § 2103, which directs this Court to treat appeal papers as a petition for certiorari when an appeal "is improvidently taken . . . in a case where the proper mode of a review is by petition for certiorari". But if the Court nevertheless were to treat Seattle's appeal papers as a petition for certiorari, then the reasons specified above—and other reasons as well—would call for denial of certiorari.

1. NO BASIS EXISTS FOR AN APPEAL AS OF RIGHT IN THIS CASE

Appeals as of right from state courts to this Court are narrowly limited, by 28 U.S.C. § 1257, to two classes of cases—(1) "where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity"; and (2) "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity". Nothing brings the present case within either the first or the second of these two appeal categories. No decision has been rendered against the validity of the Federal Power Act. Nor is the case one where the validity of the Washington statute, RCW 35.84.030, has been drawn in question and the decision has been in favor

of its validity. Accordingly, no basis exists for an appeal as of right.

Seattle's jurisdictional statement makes no effort to comply with the requirements of this Court's Rule 14(1)(d), which requires a specific showing—and with specific references to the places in the record—"as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court". Thus the case is one where the appellant has "failed to meet his burden of showing that jurisdiction by appeal was properly invoked". *Sweezy* v. *New Hampshire*, 354 U.S. 234, 236. The fact is Seattle could not comply; the record simply does not contain anything which would justify being cited to support Seattle's assertion that an appeal as of right is available in this case.

It is not enough that claims of federal right, privilege or immunity were made, such as might be sufficient to support this Court's jurisdiction on certiorari. This Court has ruled on innumerable occasions that the statutory authorization for an appeal as of right is far more limited and more specific. See, e.g., *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 185-187; *Raley* v. *Ohio*, 360 U.S. 423, 435; *Slagle* v. *Ohio*, 366 U.S. 259, 264; *Union National Bank* v. *Lamb*, 337 U.S. 38, 39.[1] As the Court held, for example, in *Hanson* v. *Denckla*, 357 U.S. 235, 244:

> "But in the state court appellants . . . did not object that the statute was invalid as applied, but

[1] In *Union National Bank* v. *Lamb*, the Court emphasized that certiorari not appeal, is the route by which questions involving the scope to be given to a prior judgment shall be brought to this Court.

> rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution. Accordingly, we are without jurisdiction of the appeal and it must be dismissed."

Seattle's casual observation in the jurisdictional statement (J.S., p. 13) that the Washington Supreme Court rendered judgment "that a state statute, RCW 35.84.030, invalidates section 21 of the Federal Power Act", bears no resemblance to anything which the Washington Supreme Court actually said or did.

Moreover, no question coming within either of the two appeal categories was tendered in the notice of appeal to this Court. The pertinent excerpt is not referred to in Seattle's jurisdictional statement; accordingly, we are furnishing in Appendix A hereto (p. 37, *infra*) the entire "Questions Presented" portion of Seattle's notice of appeal. The notice of appeal raised questions (1) whether the judgment of the Court of Appeals may be collaterally attacked or was conclusive upon the state proceeding; (2) whether the issue raised by this taxpayer's action was rendered moot by the federal proceeding; and (3) whether Seattle can acquire by condemnation under Section 21 of the Federal Power Act lands owned by the PUD or whether this power is overridden by the Washington statute. This makes it plain that—consistently with the proceedings below—the notice of appeal did not set forth or comprise therein any question which qualifies under either of the two categories permitting appeals as of right to this Court from a state court. And as this Court's Rule 14(2) specifies, "Only the questions set forth in the notice of appeal or fairly comprised therein will be con-

sidered by the court". See, e.g., *Head* v. *New Mexico Board*, 374 U.S. 424, 432, note 12.

Indeed, even if it were permissible for an appellant to avail himself of new questions raised for the first time in a jurisdictional statement, it is apparent that the reformulation of the questions presented, as Seattle now sets them forth in the jurisdictional statement (J.S., p. 4),[2] still does not present questions which would support an appeal as of right.[3]

Accordingly, the present appeal should be dismissed.

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[2] This Court's Rule 15(1)(c)(2) states that, while the phrasing of the questions presented need not, in the jurisdictional statement, be identical with that set forth in the notice of appeal, nevertheless "the jurisdictional statement may not raise additional questions or change the substance of the questions already presented". When Seattle sought a stay from Mr. Justice Douglas (who denied the application on November 9, 1963), the opposition filed by this appellee showed that no appeal as of right would lie. This may well have stimulated Seattle's effort—belated and untimely as it is—to seek to use the jurisdictional statement as an occasion to reformulate the questions presented. In any event it is plain that the effort is ineffectual—not only because it comes too late, but also because even if such formulation of the issues had been made by Seattle at the outset of the litigation, it would not have brought the case within the appeal provisions.

[3] The two cases on which Seattle relies (J.S., p. 3) to support an appeal as of right are cases which furnish no support. *Hendersonville etc. Co.* v. *Blue Ridge Ry.*, 243 U.S. 563, arose several years before the Judiciary Act of 1925 brought into effect the presently-existing curtailment of this Court's obligatory jurisdiction on appeal; the case involved merely a claim of federal right, of a type which then was cognizable on writ of error but today would be cognizable only on petition for certiorari. *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, is equally irrelevant; there the record apparently satisfied this Court that the Texas courts deemed the validity of the Texas venue statute as applied to have been drawn in question and that the Texas Supreme Court's decision was in favor of validity.

2. THE JUDGMENT BEING APPEALED FROM IS NOT FINAL

The non-finality of the judgment being appealed from stands as a jurisdictional barrier to review either on appeal or on certiorari. 28 U.S.C. § 1257.

The judgment being appealed from (J.S., pp. A-12, A-13, A-14, A-15) is wholly interlocutory; it is an order by the Washington Supreme Court that the state trial court obey the Washington Supreme Court's earlier direction to proceed with the trial.

A. This Case is Wholly Different from Curry and Langdeau

Both Seattle (J.S., p. 3) and the Government (Mem. Amicus, pp. 10-12) cite two decisions which this Court rendered last term, *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, and *Construction Laborers* v. *Curry*, 371 U.S. 542, and contend they sustain and establish their position. But neither decision supports finality in this case.

In *Curry*, an employer sought a temporary injunction against the picketing of his business by a union. The lower state court refused to grant the injunction on the ground that the National Labor Relations Board had exclusive jurisdiction over the dispute. The Georgia Supreme Court determined that the Labor Board did not have exclusive jurisdiction and ordered the trial court to grant the temporary injunction. The Georgia Supreme Court had thus prohibited the union from doing acts which it had a right to perform under federal law. The Georgia decision was final insofar as the union's right under the federal law was concerned.

Curry is clearly distinguishable from the present case. Here the writ of mandamus which issued October 7, 1963, cannot be considered final as taking from

Seattle any right it possesses as a licensee of the Federal Power Commission. The Washington Supreme Court's order did not prevent Seattle from going ahead with construction work on the Boundary project, nor did it interfere with the judicial proceeding Seattle had instituted to condemn the PUD's properties. Those are rights which Seattle claims to hold as a licensee. Whatever Seattle received by its license, Seattle still possesses.

In *Curry* the Georgia Supreme Court's order to the trial court to issue the temporary injunction was final so far as taking from the union a right conferred on it by federal law. This Court's opinion shows that for all practical purposes the litigation had been terminated by the proceedings held in the Georgia Supreme Court on the temporary injunction (371 U.S. at 550-553). In addition, experience had taught the lesson that the issuance of a state court temporary injunction in a labor dispute might effectively dispose of the petitioner's right to review in this Court as well as his right to a hearing before the Labor Board (371 U.S. at 550); and this Court concluded that "postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts" (371 U.S. at 550). The impact of such considerations, in the historical context of federal-state relationships in the field of labor disputes, was emphasized again by the Court only the other day in *Liner* v. *Jafco, Inc.*, No. 43, decided January 6, 1964.

In the present case, on the other hand, the question whether Seattle's claims of a right to condemn all property necessary for the Boundary project are limited by this state statute is yet to be determined.

After a trial on the merits the trial court (see p. 17, *infra*) now has ruled that the state statute is not effective to prevent Seattle from having a right to condemn the PUD's properties, even though some of those properties are covered by the statute. The case is now moving in regular course to the Washington Supreme Court for review of the final judgment on the merits; and this fact makes it evident how readily available is the normal channel of appellate review.

In *Langdeau*, a receiver for a Texas insurance company had brought an action in fraud in the state court in Travis County, Texas, against two national banks which were located in Dallas County. The National Banking Act, 12 U.S.C. § 94, gave these banks an immunity from suit in the state courts of Travis County. But nevertheless, the Supreme Court of Texas ordered the trial court to proceed with a determination of the merits. That order deprived those banks immediately of a federal privilege and immunity. They were entitled to enjoy the immunity which the federal statute granted them. The order subjected those banks to a lawsuit in a prohibited venue. That order, in itself, was a violation of the very privilege and immunity which the federal statute was designed to protect. As in the *Curry* case, there was nothing inconclusive or speculative about the decree of the Texas Supreme Court insofar as the federal privilege and immunity of the banks were concerned. The decree of the Texas Supreme Court conclusively deprived them of those rights. They had nowhere to go except to this Court. Here again, as in *Curry*, they could look only to this Court for redress.

Although in both *Curry* and *Langdeau* the cases had not been fully determined on their merits in the state

courts, yet insofar as the federal rights and privileges of the parties were concerned, both state court decisions were final. Parties in both cases were being immediately deprived of rights specifically conferred on them by federal law, and in both cases their possibilities of redress through state courts had been exhausted.

But such is not the case with Seattle. The Federal Power Act does not grant to licensees an immunity from suits under state law which are otherwise cognizable in the state courts. The alleged federal right or privilege for which Seattle seeks protection in this Court is its right to carry out the powers bestowed upon it through its FPC license. The courts of Washington have not finally determined any deprivation of such claim of right, either permanently or temporarily. On the contrary, the *Beezer* litigation has not deterred Seattle from carrying out the purported powers granted by its license. In its jurisdictional statement Seattle specifically called attention to the fact that it has been going forward with work at the Boundary dam site according to the schedule which the FPC made for construction. Seattle says (J.S., p. 12):

> "In order to have any hope of meeting this deadline, it was necessary for the City to proceed with construction as quickly as possible. Many construction contracts involving access, clearing and other work for the Boundary site are finished or in process at a cost of about $6,000,000 and notices to proceed have necessarily been given on contracts covering turbines, generators and other equipment totaling over $13,000,000."

It may be added that Seattle has carried on its work on the Boundary project all through the trial and will continue the work during the period of appellate re-

view. Nothing in the writ of mandamus prevented or interfered with Seattle's exercise of any right, or claimed right, under the Federal Power Act.

Nor has the writ of mandamus deprived Seattle of going ahead with its judicial proceeding to condemn the properties of the PUD. Seattle filed a condemnation suit in the federal district court for the Eastern District of Washington in March 1963. Motions have been filed, argued and ruled upon. That court refused to stay proceedings to await the result of the trial of this case in the state court. The pretrial hearing is set for February 25, 1964, and the trial for April 6, 1964. Thus Seattle is proceeding to exercise every right it claims is conferred upon it as a licensee under the Federal Power Act.

In *Curry* and *Langdeau*, the test of finality was whether the judgments had finally deprived the petitioners of a federal right. In those cases the Georgia and Texas state supreme court judgments did finally take away certain rights granted under federal law. The Washington Supreme Court judgment has not finally determined any of Seattle's rights under the Federal Power Act; and the trial court's subsequent decision, after trial on the merits, has sustained Seattle's right to condemn the PUD's properties. If the Washington Supreme Court does reverse the trial court, a petition for certiorari by Seattle might then be in order.

B. This Mandamus Is Not an Independent Proceeding

The other line of decisions on which Seattle (J.S., p. 3) and the Government (Mem. Amicus, pp. 12-13) are now relying to establish finality consists of situ-

ations where a mandamus proceeding has been regarded as distinct and independent.

From time to time cases have arisen where, as here, a state court mandamus or prohibition application is filed in connection with already-pending state court litigation. This Court in some situations has accepted as sufficiently "final" a state court judgment on such an application for an extraordinary writ where the judgment had the effect of allowing or directing the main litigation to proceed to trial. In finding the requisite finality, this Court's ground has been that the prohibition or mandamus proceeding was to be regarded as a distinct and independent judicial proceeding. *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8; *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 565-568, and cases cited; *Pacific Coast Dairy* v. *Dep't,* 318 U.S. 285; *Madruga* v. *Superior Court,* 346 U.S. 556, 557, note 1; *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656.

But the mandamus in the present taxpayer's suit is entirely different from the cases in which this Court has found the requisite finality. This mandamus grew out of the fact that the trial judge refused to do what the Washington Supreme Court had already told him to do. Thus the mandamus application is not in any sense distinct and independent from the main proceeding. Long before this mandamus application became necessary, the main proceeding in this taxpayer's suit already had been before the Washington Supreme Court on appeal from the trial court's summary dismissal of Beezer's complaint. By its initial decision of July 12, 1962, the Washington Supreme Court had reversed, adjudging that this case must proceed to trial (J.S., p. C-1). Its decision expressly

stated that if, after a trial, the trial court found that the PUD property is covered by the Washington statute which forbids Washington cities to condemn such properties of a public utility district, then "we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the property by negotiation and proceed under its license; and it should not be precluded from so doing" (J.S., p. C-5).

Seattle's subsequent motion resulted in a second opinion from the Washington Supreme Court, dated October 2, 1962, adhering to the initial decision (J.S., p. D-1). The Washington Supreme Court issued its remittitur November 20, 1962, remitting the case for further proceedings in accordance with its opinion and directing that costs abide the final determination of the cause (R. 0077). This judgment, remanding the case for trial on the merits, was interlocutory. Because of the lack of finality, Seattle could not have brought the judgment to this Court for review (see, e.g., *Bostwick* v. *Brinkerhoff*, 106 U.S. 3; *Cincinnati Street Railway Co.* v. *Snell*, 179 U.S. 395; *Southern Pacific Co.* v. *Eufrazia*, and *Southern Pacific Co.* v. *Eelk*, 351 U.S. 493), unless the whole body of law as to finality of judgments were to be discarded. Moreover, the judgment was one which Seattle did not even attempt to bring to this Court for review within the time prescribed by law.

The trial court declined to proceed with the trial despite this express direction it had received from the Washington Supreme Court. Beezer and the PUD accordingly asked the Washington Supreme Court to

mandamus the trial court. The mandamus application (R. 0078-0083) sought an order requiring the trial court to proceed with the trial of the case exactly as the Washington Supreme Court, by its interlocutory judgment, already had ordered. In deciding the mandamus application on July 18, 1963, the Washington Supreme Court directed that the trial court "should proceed in accordance with our former direction" (J.S., p. A-7). On October 7, 1963 the Washington Supreme Court issued its judgment to that effect, now being appealed from, and again provided that costs were to abide the final determination of the cause (J.S., pp. A-12, A-13, A-14, A-15).

Under these somewhat unusual circumstances, where the mandamus application is for the purpose of compelling the trial court to follow a previously-issued direction to proceed with a trial, the mandamus proceeding is not a distinct and independent proceeding within the meaning of this Court's prior decisions; the judgment is not properly to be deemed a final judgment. Finality under 28 U.S.C. § 1257 is "a question of purely federal law", *Gotthilf* v. *Sills*, 375 U.S. 79, 80. Applying this Court's thought in *Di Bella* v. *United States*, 369 U.S. 121, 131, it seems clear that, "in the wake of such proceedings", the Washington Supreme Court's order granting the mandamus application was "truly interlocutory"; it was entirely incidental to the main proceedings in the taxpayer's suit which were "then fairly in train". An interlocutory judgment does not become converted into a final judgment, within the meaning of 28 U.S.C. § 1257, merely because a trial court, by refusing to follow prior instructions to proceed with a trial, makes it necessary for those prior instructions to be buttressed by mandamus.

Indeed, if a judgment such as the one involved in this case were treated as final, then the strong Congressional policy against review of non-final state court judgments would be seriously impaired. Seattle's effort to bring the case to this Court for review at this stage runs counter to "the policy against premature constitutional adjudication"; it also ignores the principle that the "constitutional question necessary for decision will not be isolated until the precise pinch of the order on the appellant is known". See Mr. Justice Douglas' concurring opinion in *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 73-74. The precise nature of the order to be entered against Seattle—or even whether the Washington Supreme Court will determine that any order at all should be entered against Seattle—cannot be known until this taxpayer's suit has been completed.

For reasons basic to our federal system Congress decided, at the very beginning of our history as a nation, that only final judgments shall come here from the state courts.

The final judgment requirement unquestionably is sometimes an inconvenience or a hardship to litigants who would like to obtain an earlier review. But in balancing this consideration against the weighty factors on the side of not accepting review at an interlocutory stage—factors such as the importance of preventing piecemeal review, the elimination of the delays incident to interlocutory appeals, the avoidance of premature constitutional adjudication, and the minimizing of conflict between the state and federal courts—Congress has been steadfast in keeping the finality requirement as a jurisdictional prerequisite for this Court's review of state court judgments. As

the Court said in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124: "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal system."

There are, moreover, no special or unusual provisions in the Federal Power Act which would justify any suggestion that the general finality requirement of 28 U.S.C. § 1257 has somehow been *pro tanto* repealed by implication for cases such as the present one. The Government (Mem. Amicus, pp. 11-12) now claims that the possibility of state court litigation, even when instituted by persons who were not parties to the federal licensing proceeding, might unduly interfere with Congressional objectives manifested in the Federal Power Act. But if Congress were to agree that such a possibility really overrides the fundamental considerations supporting the final judgment requirement, then it would be a simple enough matter for Congress to amend 28 U.S.C. § 1257 so as to allow interlocutory state court judgments to be brought here in such cases. This is a step which Congress never has taken.

Instead of looking to this Court for such a fundamental change in the law, those who are dissatisfied with the finality policy prescribed by 28 U.S.C. § 1257 should address their arguments to Congress. From time to time Congress has modified the finality requirement to permit certain classes of interlocutory appeals from the lower federal courts.[4] But it never has seen

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[4] See Note, "Appealability in the Federal Courts", (1961) 75 Harvard L. Rev. 351.

fit to do so in connection with this Court's power of review over the state courts.

Moreover, as we have stated (p. 7, *supra*), the lack of finality stands as a bar to review either on appeal or on certiorari.

3. IN ANY EVENT, AT THIS INTERLOCUTORY STAGE OF THE PROCEEDING THIS COURT SHOULD NOT EXERCISE ANY POWER OF REVIEW

Even apart from the statutory question as to finality of judgment, 28 U.S.C. § 1257, the judgment being appealed from would bring the taxpayer's suit to this Court at such an interlocutory stage that the exercise of any power of review by this Court would be wholly inappropriate. As this Court said in *Rescue Army* v. *Municipal Court, supra,* 331 U.S. at 568—having there found the judgment sufficiently final to give this Court jurisdiction—"nevertheless compelling reasons exist for not exercising it"; and this Court accordingly dismissed the appeal.

Here the definitive answer to an important question of state law, heretofore unresolved, is about to be obtained as a result of this state court proceeding. The trial has now taken place; proposed findings and briefs were duly submitted to the trial judge; on January 9, 1964, the case was orally argued before the trial judge. The trial judge ruled that certain portions of the PUD's properties—namely, the gauge station—are electric properties within the meaning of the Washington statute; that the remainder of the PUD properties are not; but that the federal supremacy doctrine permits Seattle to condemn the electric properties despite the prohibition contained in the Washington statute. As soon as the trial judge makes

formal findings and conclusions, and enters formal judgment on the merits in favor of Seattle, appeal to the Washington Supreme Court will be taken.

Until the trial court's judgment has been reviewed on appeal by the Washington Supreme Court, the kind of relief, if any, which will be granted against Seattle will not be known and the exact relationship between that relief and the claimed scope of the judgment in the federal licensing proceeding will be a matter of guesswork rather than certainty. Furthermore, there is always the possibility that changes of circumstances will occur which will make it unnecessary for the Washington Supreme Court to render a final judgment and hence unnecessary for this Court to decide the complex federal questions which Seattle claims the case involves.

The interlocutory review which Seattle now seeks in this Court is more likely to delay than to expedite the emergence of a clear definition of all such matters. Moreover, Seattle's extravagant claims (J.S., pp. 12-13) of the need for exceptional haste by this Court seem particularly unimpressive in view of the fact that about fifteen months could easily have been saved in this lawsuit if Seattle had allowed the case to go to trial promptly after the Washington Supreme Court, on July 12, 1962, first held that it must.[5] "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure." *Duke Power Co.* v. *Greenwood Co.*, 299 U.S. 259, 268.

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[5] Similarly, the Government's concern for meeting "a federally prescribed timetable" (Mem. Amicus, p. 11) would have been more appropriately expressed if, back in July 1962, the Federal Power Commission had begun to urge that Seattle expedite this lawsuit instead of delaying it.

As *Rescue Army* shows, it would be premature for the Court to entertain an appeal at this stage of this proceeding; and in connection with review on certiorari, where there is greater scope for the discretionary element in the Court's jurisdiction, the same considerations are even more compelling against accepting the case now.

4. THIS APPEAL HAS BECOME MOOT

The Washington Supreme Court judgment being appealed from directs the trial court to follow previously-issued instructions and try this taxpayer's suit on the merits (J.S., p. A-15).

After the Washington Supreme Court entered this judgment, Seattle sought to obtain a stay. Its stay applications were denied successively by the Washington Supreme Court and by Mr. Justice Douglas (J.S., p. 13). The effect of denying the stay was to allow the case to proceed to trial, as ordered. The trial court then did proceed with the trial, thereby complying with the mandamus judgment Seattle here is appealing from. The trial by now has been completed and the trial court has made its ruling (see p. 17, *supra*).

Thus the mandamus order has fully performed its function; the trial judge has obeyed it in every respect. As in other cases where mandamus orders have been complied with while an appeal is pending, in this case there now does not remain any substantial subject matter of the present appeal from the Washington Supreme Court's judgment granting mandamus. *Brownlow* v. *Schwartz*, 261 U.S. 216; *Codlin* v. *Kohlhausen*, 181 U.S. 151; *Norwegian Co.* v. *Tariff Comm.*, 274 U.S. 106, 110-112. What the Court said in *Brown-*

low v. *Schwartz*, *supra*, 261 U.S. at 217, is equally applicable here: "An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other."

Accordingly this appeal should be dismissed. *Castellano* v. *Commission of Investigation of the State of New York*, 361 U.S. 7; *Voltaggio* v. *Caputo*, 371 U.S. 232; *Ditson* v. *California*, 372 U.S. 933. For the same reasons, review on certiorari should not be entertained.

5. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE JUDGMENT BEING APPEALED FROM

A. Requiring That Seattle Proceed to Trial Does Not Raise a Substantial Federal Question

By this time, as we have noted (p. 17, *supra*), the trial has been fully completed. But even if the trial had not yet occurred, it is clear that requiring Seattle merely to proceed to trial would not raise any issue reviewable by this Court. *Petroleum Co.* v. *Comm'n*, 304 U.S. 209, 222; *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 540, and cases cited; compare *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. at 584; *Parr* v. *United States*, 351 U.S. 513, 519-520.[6] The issue is not a substantial federal question. Accordingly, it presents no ground for review either on appeal or on certiorari.

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[6] Conversely, there should be noted the heavy degree of protection which the Federal Power Commission enjoys against judicial review of its own non-final orders which impose a hearing upon a respondent who is contesting the Commission's jurisdiction. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375; compare *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52.

In the course of reviewing the issuance of Seattle's license, the District of Columbia Circuit concluded that, because of Section 21 of the Federal Power Act, Seattle would obtain a right to defy the state statutory restriction on its charter. In the present taxpayer's suit, on the other hand, the Washington Supreme Court concluded that no such right would be conferred on Seattle if the state statutory restriction is found to cover the PUD properties. Particularly in view of these conflicting approaches, a substantial question would emerge if the Washington Supreme Court determines that the state statute does cover the PUD properties and that Seattle has no right to condemn them. But, as already indicated (pp. 7-19, *supra*), it would be premature at this stage for this Court to review Seattle's claim that the Washington state courts are not giving sufficient effect to the federal judgment.

B. A Final Judgment, if Rendered Against Seattle, Will Not Contravene the Res Judicata Principles Expressed in This Court's Tacoma Decision or Elsewhere

Despite the prematurity of the question, it may be helpful if we respond now, and in advance, to Seattle's argument, looking ahead to the possibility that the Washington Supreme Court's final judgment on the merits will be adverse to Seattle. Such a final judgment would not—as Seattle has been claiming—constitute an "impermissible collateral attack" on the federal licensing proceeding.[7]

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[7] The federal licensing proceeding is reported as *City of Seattle*, 26 FPC 54, 61, 463, affirmed, *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. 2d 318, certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871 (No. 611, October Term 1962).

Seattle's claim stems from basic misconceptions as to what the federal licensing proceeding actually did or could conclusively determine and as to whom it actually did or could conclusively bind.

The federal licensing proceeding did adjudicate conclusively (although, for the reasons we have set forth in No. 611 of 1962 Term, in our view the adjudication was erroneous) that the license issued by the Federal Power Commission to Seattle was validly issued.[8] But certainly it did not and could not adjudicate conclusively that the Washington state courts are powerless to grant relief against Seattle if—after full trial on the merits of the already-pending taxpayer's suit brought by a taxpayer not a party to the licensing proceeding—they find that Seattle's proposed condemnation of the PUD properties violates the affirmative statutory prohibition which the Washington Supreme Court describes (J.S., p. C-4) as "clearly a declaration of the public policy of the state, dating back thirty years, and . . . in no sense an attempt to exercise a veto over said project."

Both Seattle (J.S., pp. 18-20) and the Government (Mem. Amicus, pp. 13-16) rely heavily on the *Tacoma* litigation[9] for their claim that the federal licensing proceeding would preclude the state courts from enter-

[8] The conclusiveness of that adjudication is subject to the qualification that the matter would be open to further review in the event that this Court were to vacate the denial of certiorari in No. 611 of 1962 Term.

[9] *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (No. 509 of October Term 1957), preceded by *State of Washington Department of Game* v. *Federal Power Comm'n*, 207 F. 2d 391 (9th Cir. 1953), certiorari denied, 347 U.S. 936 (No. 514 of October Term 1953).

ing judgment against Seattle in this taxpayer's suit. But *Tacoma* was a very different case. In the light of these differences, the res judicata doctrine which *Tacoma* developed in no way controls the ultimate disposition of the present taxpayer's suit.

1. Preliminarily it should be noted that, unlike the present case, *Tacoma* did not involve any issue as to whether the state courts could proceed with a trial. *Tacoma* came to this Court only after the Washington Supreme Court's final judgment on the merits.[10]

2. In *Tacoma* the State of Washington had actually appeared both before the Federal Power Commission and before the Ninth Circuit. In addition, as this Court noted (357 U.S. at 326), the State's Attorney General had appointed a Special Assistant Attorney General "to represent all persons of the State whose views were in conflict with the State's official position."[11] This Court held in *Tacoma* that the State of Washington had represented all its citizens, expressly relying (357 U.S. at 340-341) on a long line of decisions to the effect that, as *parens patriae*, a State does represent the interests of its citizens in various matters.

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[10] See the *Tacoma* record, No. 509 of October Term 1957, at R. 260-262 for the state trial court's judgment, and at R. 372-373 for the Washington Supreme Court's judgment of affirmance.

[11] This had, moreover, enabled the respondents, in opposing the petition for certiorari to the Ninth Circuit, to say: "Thus the State of Washington by its Attorney General and the people of Washington holding views opposed to the State's departmental position were represented at the hearings before the Federal Power Commission." (Brief for the Federal Power Commission and the City of Tacoma in Opposition, p. 5, in *State of Washington Department of Game* v. *Federal Power Commission*, No. 514 of October Term 1953).

Here, on the other hand, neither the plaintiff Beezer nor any other taxpayer of Seattle appeared either before the Commission or before the Court of Appeals; and no one ever did represent, or was designated to represent, those citizens and taxpayers of Seattle whose views might be opposed to the City's official position. Nothing is cited to support the Government's far-fetched claim (Mem. Amicus, pp. 14-15) that Beezer must be deemed to have "accepted the representation of the City of Seattle" in the licensing proceeding and "cannot now object that the City adopted a litigating position different from that he would have chosen."

Beezer is not challenging the validity of Seattle's license; he is seeking to require Seattle to live within its charter. As a stranger to the federal licensing proceeding he is not bound by determinations which the District of Columbia Circuit may there have made on subsidiary issues of law when it decided the license had been validly issued. In holding that res judicata does not apply to this taxpayer's suit because "the subject matter, the parties, and the purpose of the proceedings are different" (J.S., p. A-6), the Washington Supreme Court has the support not only of Washington decisions on which it relied (see p. 35, *infra*), but also of the long line of decisions in this Court establishing that those who are not parties or their privies, or are not adequately represented by parties, do not become bound. See, *e.g.*, *Gratiot County State Bank* v. *Johnson*, 249 U.S. 246; *United States* v. *Pink*, 315 U.S. 203, 216; *Hinderlider* v. *La Plata Co.*, 304 U.S. 92, 103; *Washington* v. *Oregon*, 297 U.S. 517, 528-529; *Western U. Tel. Co.* v. *Foster*, 247 U.S. 105, 115; *Western Union Co.* v. *Pennsylvania*, 368 U.S. 71, 75; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 690-692.

As the Washington Supreme Court has made clear, this taxpayer's suit instead raises the question whether Seattle's officials shall be prevented from violating a fundamental statutory restriction on Seattle's powers—a question in which, under Washington law, the taxpayers of Seattle have a proper interest and the right to enforce that interest by suit. In such a suit Beezer clearly is not foreclosed from raising the applicability of the state statutory restriction even though that matter may have been the subject of consideration in the federal licensing proceeding to which he was not a party.

Mr. Justice Brandeis' opinion for the Court in *Gratiot County State Bank* v. *Johnson*, *supra*, 249 U.S. 246, is instructive on this point that "persons who might have made themselves parties to a litigation between strangers but did not, are not bound by the judgment".[12] The more recent decisions of the Court

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[12] There the federal court in making its adjudication of bankruptcy had determined that the bankrupt had been insolvent during the entire four-month period prior to the filing of the bankruptcy petition. This Court held that in a subsequent state court suit to recover from the creditor an alleged preferential payment which the bankrupt made to him during the four-month period, the creditor nevertheless remained free to contest whether the bankrupt actually had been insolvent at the time the payment was made. The Court held that even though a federal court's adjudication of bankruptcy is "conclusive upon all the world", nevertheless it "is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto"; and that a creditor, although he had a right to intervene in the bankruptcy proceedings, "unless he exercises the right to become a party, he remains a stranger to the litigation, and, as such, unaffected by the decision of even essential subsidiary issues", it being the general rule that "persons who might have made themselves parties to a litigation between strangers but did not, are not bound by the judgment" (249 U.S. at 248-250).

emphasizing the proper limits on the scope of res judicata and collateral estoppel are fully in accord. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322; *Kersh Lake Drainage Dist.* v. *Johnson*, 309 U.S. 485, 492-495; compare *Yates* v. *United States*, 354 U.S. 298, 335-338.

3. The state law issue which brought *Tacoma* to this Court was whether the City of Tacoma lacked capacity to condemn State-owned land. This issue never even was raised in the state court until long after Tacoma's federal licensing proceeding had run its entire course through the end of the process of judicial review.[13] Hence it had the appearance of a tardy afterthought, raised belatedly after the completion of a federal licensing proceeding in which the State of Washington and all its citizens had actually enjoyed the benefits of a full day in court (see p. 23, *supra*).[14] Here, on the other hand, the taxpayer's suit was filed in the state

[13] The Ninth Circuit's decision was rendered October 5, 1953; certiorari was denied April 5, 1954, (see note 9, supra). The record in *Tacoma* shows that, although the state court proceeding had been pending since February 3, 1952, nevertheless the first time that the issue as to the capacity of the City of Tacoma to condemn State-owned land was raised in the state court proceeding was on August 29, 1955, by the defendants' answer and cross-complaint to plaintiff's amended complaint (R. 168-174 in No. 509, October Term 1957).

[14] Another exceptional circumstance in *Tacoma* was that the state court suit had gone up to the Washington Supreme Court on an initial appeal in which the City of Tacoma's position was sustained in a decision rendered October 14, 1953; and in reliance on that decision the City had accepted bids on a block of its revenue bonds (357 U.S. at 329-330). It was only thereafter that the state law issue as to Tacoma's lack of capacity to condemn State-owned land had been belatedly raised for the first time as an issue in the state-court litigation; and on this belatedly-raised ground, the City then lost the case in the Washington Supreme Court following a change in that court's composition (357 U.S. at 332, note 14).

court November 29, 1961 (R. 0001), shortly after the Federal Power Commission's decision and order and while the case was pending at a preliminary stage on petition for review in the Court of Appeals.[15] In every respect Beezer's raising of the issue by instituting this taxpayer's suit was timely.

4. Here (unlike the situation of the Ninth Circuit in *Tacoma*) the District of Columbia Circuit was fully aware not only of the pendency of this state law issue in the taxpayer's suit in the state court but also of the views expressed by the Washington Supreme Court in its July 12, 1962, decision (reproduced here in J.S., Appendix C), to the effect that this state law issue must proceed to trial.[16] Despite this, the District of Columbia Circuit said nothing to indicate that it thought the trial of the taxpayer's suit in the state court should not proceed. Nor did it say anything indicating that its decision was intended in some way to foreclose further inquiry and adjudication by the state courts in this taxpayer's suit, which was not challenging the validity of Seattle's license and which had been initiated by a taxpayer not a party to the federal licensing proceeding. If the District of Columbia

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[15] The taxpayer's suit was filed by Beezer in the state court before the Federal Power Commission, on December 15, 1961, had filed in the District of Columbia Circuit its certificate of record of the proceedings before the Commission.

[16] The parties' briefs in the District of Columbia Circuit referred to the pendency and status of the *Beezer* case. A motion to stay the proceedings in the District of Columbia Circuit, pending the outcome of the *Beezer* case, was denied by the District of Columbia Circuit. The July 12, 1962, decision of the Washington Supreme Court in the *Beezer* case (J. S., Appendix C) was lodged with the District of Columbia Circuit on July 16, 1962, about a month and a half before the District of Columbia Circuit rendered its decision.

Circuit actually had intended its judgment to have any such far-reaching effect—an effect which, for the reasons we have indicated (pp. 24-26, *supra*), would have been well beyond the scope of its power—then in the actual posture of this case its omission to say so, seems extraordinary. In any event, such an intention should not lightly be inferred. The more reasonable interpretation is that no such intention existed. Compare *Kersh Lake Drainage District* v. *Johnson, supra,* 309 U.S. at 492-495; *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, 801-803.

5. The state law issue here is of a very different nature from the one involved in *Tacoma.* As the Washington Supreme Court here has pointed out (J.S., p. C-3, "when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do." In other words, in *Tacoma* the City of Tacoma merely lacked express authority to condemn State-owned land—a gap which Section 21 of the Federal Power Act could fill without doing violence to the traditional division of authority between the states and the Federal Government. Nothing in the *Tacoma* decision involved an invasion of the sovereignty of the State. It was under such circumstances that the federal licensing proceeding, in which the State of Washington and all its citizens had been fully represented (see p. 23, *supra*), was deemed finally determinative of the issue as to whether the gap was thus filled.

Here, on the other hand, the state law issue arises not because of a gap but because of a strong affirmative prohibition which expresses the State's long-standing policy. As the Washington Supreme Court said (J.S., p. C-3), Seattle "had a known and express limitation

on its power, i.e., it could not condemn '. . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district.' " The reach of this express statutory limitation on Seattle's municipal charter is peculiarly an intrastate matter and should not be deemed finally foreclosed by a federal licensing proceeding. The state courts provide the most suitable forum for developing a full record and exploring the complexities and the ramifications of a controversy of this kind—a controversy which involves, essentially, the extent of the State of Washington's legislative control over the relationships between two municipal corporations which are both political subdivisions of the State. Anything said on this matter during the course of the federal licensing proceeding should be regarded as subject to further consideration in the light of final pronouncements by the Washington Supreme Court, which now (see pp. 17-18, *supra*) will have an opportunity to decide whether the trial court's dismissal of the complaint after a full trial on the merits should be reversed.[17] The fundamental nature of the controversy, and its importance in federal-state relationships, make it in any event unsuitable to regard the federal licensing proceeding as res judicata upon such an issue.

If despite these important distinctions it nevertheless should be thought that something said in *Tacoma* does reach out to cover the present taxpayer's suit, then we suggest that any such portions of *Tacoma* be

[17] Compare this Court's ruling, though in a somewhat different situation, in *Blair* v. *Commissioner*, 300 U.S. 5, 9, that "after the decision in the first proceeding, the opinion and decree of the state court created a new situation" which "cannot justly be ignored."

reexamined. In *Tacoma* the briefs of the respondents in this Court were exceptionally meager in dealing with the res judicata issue—the sole issue on which this Court rested its decision. A more extensive briefing than occurred in that case would, we feel, be of help in establishing the limits to be placed on the doctrine of res judicata and the strong reasons why—regardless of what the *Tacoma* opinion may or may not be thought to say—the res judicata doctrine should not be pressed to the extreme of covering a case such as the present one. In recent years res judicata has been given broad scope. See, e.g., *Durfee* v. *Duke*, 375 U.S. 106, and cases cited; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371. But the Court always has recognized that the command of res judicata is not inexorable, and that various situations do arise where considerations of fairness or of the public interest require that the doctrine not be given controlling force. See, e.g., *United States* v. *R.C.A.*, 358 U.S. 334; *Labor Board* v. *Denver Bldg. Council*, 341 U.S. 675, 682-683; *Yates* v. *United States*, 354 U.S. 298, 335-338; *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416; *Kovacs* v. *Brewer*, 356 U.S. 604; *Fay* v. *Noia*, 372 U.S. 391, 422-424; *Accardi* v. *Shaughnessy*, 347 U.S. 260, 263-264; *Kalb* v. *Feuerstein*, 308 U.S. 433; *United States* v. *Stone & D. Co.*, 274 U.S. 225, 230-237; *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661, 669-671. If the Washington Supreme Court decides that the PUD properties are covered by the Washington statute, then there is an overriding public interest that this case be decided correctly on the merits.

C. A Final Judgment, if Rendered Against Seattle, Would Be Correct in Determining That Section 21 of the Federal Power Act Does Not Confer on Seattle a Right to Defy the Statutory Limitation of Its Charter

We turn to the last question discussed by Seattle (J.S., pp. 4, 17-21)—the question on which the Washington Supreme Court has expressed its total disagreement with the District of Columbia Circuit. This question is whether Section 21 of the Federal Power Act confers on Seattle a right to defy the prohibition whereby the Washington legislature, by legislation applicable to all Washington cities (RCW § 35.84.030), has affirmatively prohibited Seattle from condemning electric properties of the PUD.

For reasons we have indicated (pp. 7-19, *supra*), this federal question is premature at this time. But whenever it does become or be deemed ripe for review in this proceeding, we fully agree that it is a question of great importance. It is our submission that on the merits of this important matter of federal-state relationships, the Washington Supreme Court is clearly right and the District of Columbia Circuit is clearly wrong. We shall summarize our position here, in view of the frivolous claim now being made by Seattle (J.S., pp. 17-21) that the Washington Supreme Court's views on this matter are "contrary to long established principles set forth by this Court."

The only two decisions of this Court which Seattle cites in support of such a remarkable assertion are *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, and the earlier decision in *First Iowa Coop.* v. *Power Comm'n*, 328 U.S. 152. In *Tacoma*, as we have already seen (pp. 22-30, *supra*), this Court's decision rested solely on the res judicata ground that, because of the con-

trolling effect of the particular judgment in the prior federal licensing proceedings, the state court was foreclosed from making a decision on the merits. This Court's opinion was careful not to pass upon, or intimate any view upon, the merits of the question whether Section 21 of the Federal Power Act should be interpreted as conferring upon the City of Tacoma a right to condemn State-owned land when the Washington legislature had omitted to make an express grant of such power to the City. And in addition, the issue in *Tacoma* on the merits—even if it had been reached by this Court—would have involved merely a gap in state law and not, as here, an affirmative statutory prohibition (see p. 28, *supra*). The importance of the distinction has long been recognized; as this Court said in *Dallemagne* v. *Moisan*, 197 U.S. 169, 174:

> "It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the State."

With respect to *First Iowa*, that case involved a state law which forbade the construction of a dam in a navigable stream without obtaining a permit from a State executive council; quite naturally, this Court (328 U.S. at 164) held the state law to be a "veto" law which was superseded by the Federal Power Act. Here, however, the Washington statute makes no reference to a dam or a navigable river; it is in no sense a "veto" law; it is not aimed at prohibiting the development of a project at Boundary; it simply prohibits Washington cities from condemning the electric properties of Washington public utility districts; and

no Washington statute prohibits anyone else from making such condemnation.

This Court's opinion in *First Iowa* states expressly (328 U.S. at 178): "The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves." It thus gives direct support to the views expressed here by the Washington Supreme Court, to the effect that this Washington statute (if it is found on the evidence to apply to the facts of this case) would be effective to prevent Seattle from acquiring a right to condemn the PUD properties. Indeed, there is virtually no state law which could be entitled to a greater "effectiveness" than a statute by which the State fixes and controls the powers and relationships of its own municipal corporations, one against the other. This Court repeatedly has declared and sustained the sovereign power of a State to control the activities of its own municipal corporations. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178-179; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 397-399; *Williams* v. *Mayor*, 289 U.S. 36, 40. Subject to the narrow exceptions necessary to prevent federal constitutional guaranties from being "manipulated out of existence", *Gomillion* v. *Lightfoot*, 364 U.S. 339, 345, it is the State and not the Federal Government which determines and controls what powers shall be conferred on, and what powers shall be prohibited to, the State's municipalities.

Rights conferred by Section 21 of the Federal Power Act should be interpreted in a manner which will be harmonious with this fundamental principle and will avoid serious constitutional questions. Nothing in the legislative history of the Federal Power Act provides

any justification for the extraordinary view taken by the District of Columbia Circuit. Instead, the matter calls for application of this Court's strong admonition that "In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress". *Parker* v. *Brown,* 317 U.S. 341, 351; see also *Penn-Dairies* v. *Milk Control Comm'n,* 318 U.S. 261, 275; *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443. The Court emphasized in *First Iowa, supra,* 328 U.S. at 171, and later reiterated in *Power Comm'n* v. *Niagara Mohawk Power Co.,* 347 U.S. 239, 251, that the Federal Power Act "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States", and that the Act "leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce."

It is the Washington Supreme Court, not the District of Columbia Circuit, which has come to the only conclusion consistent with these basic principles. Certainly the Washington Supreme Court would not be obliged to defer to the views of any federal court of appeals on the merits of this question when it deems those views to be incorrect. The Washington Supreme Court was fully justified in stating that "in the construction of federal statutes only the decisions of the Supreme Court of the United States are binding upon us", and that this particular question "presents a prob-

lem in federal-state relationships which can be decisively answered only by the United States Supreme Court "(J.S., p. A-5).

6. THE JUDGMENT RESTS ON AN ADEQUATE NONFEDERAL GROUND

Among the grounds on which its decision rests, the Washington Supreme Court has held (J.S., p. A-6; see p. 24, *supra*) that the decision of the District of Columbia Circuit in the federal licensing proceeding is not res judicata in the present taxpayer's suit because "the subject matter, the parties, and the purpose of the proceedings are different." In support of its conclusion on this point the Washington Supreme Court relied on two of its prior decisions.[18]

Particularly under the circumstances presented by this record, the ruling of the Washington Supreme Court, holding that res judicata does not operate as a bar, is not only a tenable but a clearly correct ruling on a matter of state law and procedure; it comports with settled principles of law (see pp. 23-26, *supra*); and it constitutes an adequate nonfederal ground to support the judgment that this taxpayer's suit should proceed to trial on the merits.

This adequate nonfederal ground defeats review of the present judgment either on appeal or on certiorari.

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[18] *Burke Motor Co.* v. *Lillie*, 39 Wn. 2d 918, 239 P. 2d 854 (1952), and *Curtiss* v. *Crooks*, 190 Wash. 43, 66 P. 2d 1140 (1937).

CONCLUSION

For the reasons we have set forth in this motion, it is our position that

(1) The appeal should be dismissed.

(2) If the Court were to treat the appeal papers as a petition for certiorari (although, in our view, there is no basis for doing so), then certiorari should be denied.

Respectfully submitted,

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January 16, 1964

APPENDIX A

"Questions Presented" Portion of Seattle's Notice of Appeal To This Court

The following questions are presented by this appeal:

1. Where the Federal Power Commission has issued a license to the City of Seattle for the construction of a hydroelectric project on a navigable stream and the Court of Appeals for the District of Columbia Circuit on the direct review proceedings thereof under Section 313(b) of the Federal Power Act, has held that Section 21 of the Act grants Federal eminent domain powers to the City to condemn lands necessary for the project regardless of a State law (RCW 35.84.030) argued to bar their condemnation and this court has denied certiorari, may the judgment of the Court of Appeals be collaterally attacked by a separate taxpayer's action in the Washington State Court, or is the final Federal judgment conclusive upon the State proceedings?

2. Whether the sole issue raised by this taxpayer's action, as to the power of the City, under RCW 35.84.030, to condemn the PUD lands necessary to construction of the City's FPC licensed Boundary Project, was rendered moot by the decision and judgment of the Court of Appeals for the District of Columbia Circuit, certiorari denied, which upheld the City's power to take the property in question under Section 21 of the Federal Power Act,

If the Federal judgment is not conclusive or does not render the State proceedings moot, the further question is presented:

3. Whether Seattle, as an FPC licensee, can acquire by condemnation under Section 21 of the Federal Power Act lands owned by the PUD necessary for construction of Boundary Project, or whether this power is overridden by a Washington statute (RCW 35.84.030), alleged to deprive a city from condemning an "electric power and light plant or electric system" owned by a PUD.

INDEX

	Page
1. Appeal is the proper procedure for review	2
2. The judgment below meets the Court's established tests of finality under 28 U.S.C. § 1257	5
A. The PUD's effort to distinguish Curry and Langdeau is faulty	5
B. The mandamus and prohibition cases cannot be distinguished	7
3. The PUD improperly seeks a stay of this Court's jurisdiction	10
4. The litigation below, not our appeal, is moot	11
5. The questions are substantial	13
A. The judgment below permitting a collateral attack in the state courts on the federal licensing proceedings obviously presents a substantial federal question	13
B. Beezer is bound, like the PUD, and may not collaterally attack the direct review proceedings	13
C. The Washington court has upheld the validity of RCW 35.84.030, regardless of its repugnancy to section 21 of the Federal Power Act	16
Conclusion	17

CITATIONS

CASES:

Alton v. Alton, 347 U.S. 610 (1954)	12
Charleston Assn. v. Alderson, 324 U.S. 182 (1945)	4
Collins v. Porter, 328 U.S. 47 (1946)	12
Detroit and Mackinac Railway Co. v. Michigan Railroad Comm'n., 240 U.S. 564 (1916)	7
Dyer v. City Council of Beloit, 333 U.S. 825 (1948)	12
England v. Louisiana State Board of Med. Exms., 32 U.S. Law Week 4093	11

Page

First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152 (1946) 15
Harris v. Central Nebraska Public Power & Irrigation Dist., 29 F. Supp. 425 (D.C. Neb. 1938) 14
Local 438 v. Curry, 371 U.S. 542 (1963) 5
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 5
Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960) 4
Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Company, 240 U.S. 30 (1916) .. 8
Newport News Shipbuilding and Drydock Co. v. Shauffler, 303 U.S. 54 (1938) 12
N. L. Liner v. Jafco, Inc., — U.S. —, 11 L. ed. 2d 347 (1964) 12
Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961) 7, 8
PUD v. FPC, 308 F.2d 318 (D.C. Cir. 1962), cert. denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871 ..... 1, 2
Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) 4
Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 5, 10, 13

STATUTES AND MISCELLANEOUS:

28 U.S.C. § 1257 ..... 4, 5, 7, 13

Federal Power Act—
§ 21 ..... 2, 5, 6, 15
§ 313(b) 5, 6, 14

Revised Code of Washington—
35.84.030 ..... 2, 3, 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 677

THE CITY OF SEATTLE, et al., *Appellants*

and

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Appellant*

v.

ROBERT R. BEEZER, *Appellee*

and

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellee*

On Appeal From the Supreme Court of the State of Washington

OPPOSITION TO MOTIONS TO DISMISS APPEAL

The PUD and Beezer seek to obscure the purpose of Seattle's appeal to this Court, namely to obtain enforcement of the judgment by the Court of Appeals in *PUD v. FPC*, 308 F. 2d 318 (D. C. Cir. 1962), made final by this Court's threefold denial of the PUD's petitions for

review,[1] so that the City may proceed with the construction of its Boundary project licensed by FPC on July 10, 1961. The action of the Washington Supreme Court commanding continuing relitigation in the state courts of the matters determined by the federal judgment not only refuses to recognize the validity of that judgment or the exclusive federal jurisdiction in the matter, but halts the licensed project through foreclosing the sale of bonds. The PUD's elaborate motion to dismiss this appeal and the token motion by Beezer are designed to enmesh the project in endless litigation.[2] For the reasons to follow, the objections to the appeal are without merit.

1. APPEAL IS THE PROPER PROCEDURE FOR REVIEW.

There can be no question that the crux of the litigation below in the Washington courts was the identical supersedure issue presented by the PUD to the Court of Appeals for the District of Columbia Circuit, namely, whether RCW 35.84.030 overrides section 21 of the Federal Power Act.[3] Nor is there any doubt that

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[1] Certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871. (J.S., Appendix B)

[2] The PUD and Beezer are now appealing the trial court's decision for the purpose, *inter alia*, of seeking a new trial.

[3] The Court of Appeals stated the issue thusly:

> ". . . Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, *but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by Section 21 of the Federal Power Act. That is to say, once Seattle has become a federal licensee, does the prohibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?*" (J.S., Appendix B-6, emphasis supplied)

the Washington court decided this issue in favor of the state statute. When the trial court granted Seattle's motion for summary judgment (R. 0042), which motion had been brought to test this very issue as well as the collateral attack issue, both Beezer and the PUD filed notices of appeal to the Supreme Court of Washington which included in identical terms:

> "5. The trial court erred in holding that the Federal Power Act and particularly § 21 thereof, . . . superseded . . . RCW 35.84.030 . . .
>
> "6. The trial court erred in failing to hold that if § 21 of the Federal Power Act . . . was intended by Congress to supersede RCW 35.84.030, said § 21 is invalid and repugnant to the Constitution of the United States and the Tenth Amendment thereto, . . ." (R. 0045-46; 0049-50).

The decision of the Court of Appeals, later presented to the Washington Supreme Court, held directly against Beezer and the PUD on this subject. Despite this, and despite the finality which attached to the judgment of the Court of Appeals when this Court denied certiorari, the Washington Supreme Court, in the 5-4 judgment we here appeal to this Court, declared itself "so completely convinced that we are right . . . that we are unwilling . . . to accept the opinion of the United States Court of Appeals as decisive . . ." (J. S., Appendix A-3)

The PUD's motion here concedes that the validity of RCW 35.84.030 was upheld below:

> "In the course of reviewing the issuance of Seattle's license, the District of Columbia Circuit concluded that, because of Section 21 of the Federal Power Act, Seattle would obtain a right to

> defy the state statutory restriction on its charter. In the present taxpayer's suit, on the other hand, *the Washington Supreme Court concluded that no such right would be conferred on Seattle* if the state statutory restriction is found to cover the PUD properties. . . ." (PUD Motion, p. 21, emphasis supplied)

Since the Washington Supreme Court has sustained the validity of RCW 35.84.030 as against Seattle's claim, confirmed by the Court of Appeals, that section 21 controls, the case for appeal is established. In *Charleston Assn.* v. *Alderson,* 324 U.S. 182, 185-186 (1945) this Court stated:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution [or laws of the United States], and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. . . ."

And the Court has uniformly sustained its appellate jurisdiction under 28 U.S.C. § 1257(2) where the validity of a state statute has been sustained as against a claim of overriding federal law. *Metlakatla Indian Community* v. *Egan,* 363 U.S. 555, 561 (1960); *Reconstruction Finance Corp.* v. *Beaver County,* 328 U.S. 204, 206-207 (1946).

2. THE JUDGMENT BELOW MEETS THE COURT'S ESTABLISHED TESTS OF FINALITY UNDER 28 U.S.C. § 1257.

A. The PUD's effort to distinguish Curry and Langdeau is faulty.

Contrary to the PUD's analysis of *Local 438* v. *Curry*, 371 U.S. 542, this Court there held the judgment below final under 28 U.S.C. § 1257, without waiting for the results of further trial court proceedings on the ground that the Georgia Supreme Court had finally determined that the state courts had jurisdiction in a labor dispute within the exclusive jurisdiction of the NLRB. Similarly, the Washington Supreme Court has finally decided that the state courts have jurisdiction irrespective of the exclusive review proceedings provided by § 313(b) of the Federal Power Act and the holding of the Court of Appeals in those proceedings that section 21 supersedes RCW 35.84.030. The "federal right" of the union in *Curry* to have the controversy adjudicated by the NLRB rather than the state courts was precisely the same type of "federal right" that Seattle seeks to enforce here.

The PUD's attempt to limit *Curry* to cases involving temporary injunctions in labor disputes conflicts with this Court's companion decision in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). In *Langdeau* as well as in *Curry*, the judgments appealed immediately deprived the appellants of their right afforded by a federal statute not to have to undergo certain state court proceedings. The PUD, while recognizing this (PUD Motion, pp. 10-11), seeks to argue that "the Federal Power Act does not grant to licensees an immunity from suits under state law . . ." (Motion, p. 10). On the issue involved here, however, this Court's *Tacoma* decision (357 U.S. 320) holds directly

to the contrary through its ruling that under § 313(b) an issue indistinguishable from that posed in the *Beezer* litigation below[4] is within the exclusive jurisdiction of the federal review proceedings.

If FPC licensees may be successfully subjected to relitigation in the state courts of issues within the exclusive jurisdiction of the federal review proceedings, then no licensed project can be properly undertaken until the state proceedings are terminated, regardless of the number of years this might require. The pendency of the state court proceedings forced Seattle to finance initial phases of project construction out of treasury funds now about exhausted. Further construction is dependent upon the sale of bonds, which is impossible with *Beezer* unresolved. The halting of construction of the Boundary Project not only vetoes the federally prescribed timetable for the project set by the Federal Power Commission, but will cause irreparable loss to the City of millions of dollars through disruption of its coordinated construction schedules,[5] not to mention the irretrievable loss of project power urgently required by the City's consumers.

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[4] I.e., the effect of a state law limitation on the federal powers of condemnation conferred by section 21 on licensees.

[5] For instance, if the next phase of construction work requiring bond financing cannot proceed, it will require the release of several hundred employees already hired.

B. The mandamus and prohibition cases cannot be distinguished.

The PUD seeks to distinguish this Court's long line of cases according finality under 28 U.S.C. § 1257 to mandamus and prohibition actions, by characterizing the mandamus action below as one merely to enforce the prior mandate of the Washington Supreme Court. The PUD argues that if prior decisions were incurred in the state courts to which a mandamus action relates, the mandamus is not "distinct and independent from the main proceeding." (PUD Motion, p. 12.) This argument fails for at least three reasons.

First, the distinction is irrelevant. This Court has upheld the finality of a state court judgment in a mandamus proceeding where the purpose of the mandamus was to require compliance with a prior order by a state commission, *Detroit and Mackinac Railway Co.* v. *Michigan Railroad Comm'n.*, 240 U.S. 564, 570-71 (1916). And in *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 661 (1961), a unanimous Court, speaking through Mr. Justice Frankfurter, upheld its jurisdiction over a judgment by the Supreme Court of Delaware in a prohibition action which had only been initiated by defendants in that court after their motions for summary judgment in a lower Delaware court had been denied. In fact, in none of this Court's decisions recognizing the finality of mandamus or prohibition actions has this Court ever deemed it important to determine the precise stage of the uncompleted state court proceedings or the point therein at which the mandamus action was brought. The PUD's argument which would seek to distinguish between mandamus actions on this basis is contrary to precedent.

Second, the crux of this Court's test for holding mandamus and prohibition actions final, namely, the limited purpose of such writs to keep inferior courts within their jurisdiction,[6] is clearly applicable to the mandamus proceeding below, even assuming arguendo that the purpose of the mandamus was to enforce a prior order of the Washington Supreme Court. It is clear beyond doubt, and the PUD does not deny, that the sole ultimate purpose of the mandamus action below was to require the Washington Supreme Court to assume jurisdiction over the Beezer and PUD complaints and proceed to trial. Since this is precisely within the long standing traditional scope of mandamus actions recognized as final by this Court, it is immaterial whether the mandamus also had the effect of seeking to enforce a prior order.

Third, the PUD inaccurately describes the record in seeking to characterize the mandamus action below as simply to require the trial judge to do what he had already been told to do in the Washington Supreme Court's decision of July 12, 1962. That decision, while holding that RCW 35.84.030 controlled Seattle, recognized that the state courts would lack jurisdiction to proceed if the federal courts finally held to the contrary:

> "Whether the Federal Power Commission can confer powers of condemnation on cities which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine." (J. S., p. C-4.)

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[6] See e.g. *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 657-81; *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Company*, 240 U.S. 30 (1916).

And in its decision of October 2, 1962, after the Court of Appeals decision was first presented to it, the Washington Supreme Court certainly made it appear clear that finality of the further proceedings pending in the federal arena would conclude the controversy:

> "We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, *pending such review*, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, [sic] 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, *unless, and until*, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington." (J.S., p. D-2; emphasis supplied.)

The finality referred to attached upon denial of the PUD's petition for certiorari by this Court. Although the Beezer suit had by then returned to the trial court, by consent no action was being taken pending the action of this Court (R. 0080). The trial court, pursuant to the prior Washington Supreme Court decisions, could do nothing but conclude that the finality of the judgment of the Court of Appeals upon the PUD deprived the state courts of jurisdiction. That this is so was conceded by the Washington Supreme Court in its opinion below:

> "We understand the reluctance of the Superior Court of King County to proceed, as we have directed, because of an intervening decision of the United States Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend*

Oréille County v. *Federal Power Comm.* (August 30, 1962), 308 F.(2d) 318, cert. denied, 372 U.S. 908 (1963), 9 L. Ed. (2d) 716, 83 S. Ct. 719, petition for rehearing denied, 372 U.S. 956, 9 L. Ed. (2d) 980, 83 S. Ct. 950. This reluctance is doubtless strengthened by the concessions of counsel in their briefs in a recent motion to dismiss an appeal, *and our own statements in the opinion denying the motion to dismiss* (*Beezer* v. *Seattle* (Oct. 2, 1962), 60 Wn. (2d) 652, 375 P. (2d) 256)." J.S., p. A-3, emphasis supplied.)

Thus, it is fictitious for the PUD to now assert that the mandamus action was solely for the purpose of seeking compliance with the prior mandate of the Washington Supreme Court. Until its decision below the Washington Supreme Court had consistently recognized that the federal review proceedings, when final, would be conclusive of state court jurisdiction. By its 5-4 opinion below and its final mandate to Judge Cole to assume jurisdiction regardless of the final federal judgment of the Court of Appeals, the Washington court changed its mind. In so doing it created a direct conflict between the state and federal judgments, giving rise for the first time to the reviewing jurisdiction of this Court, now invoked by Seattle.

3. THE PUD IMPROPERLY SEEKS A STAY OF THIS COURT'S JURISDICTION.

The PUD's request that this Court stay its hand while *Beezer* continues (Motion, pp. 17-19) is misplaced. To begin with, abstention necessarily presumes that the state courts have jurisdiction to decide the issue for which abstention is sought. On the supersedure issue involved in our case, *Tacoma* holds the jurisdiction of the federal courts to be *exclusive*. Moreover, an identical suggestion by the PUD was rejected

twenty months ago by the Court of Appeals.[7] The finality of that court's judgment upon denial of certiorari by this Court should bar the PUD from reasserting the matter now. But even if the PUD is not barred as a matter of procedure, this Court has very recently made it clear that the abstention doctrine does not mean that a party who has fully and freely litigated his rights in one system of courts should be permitted to do so all over again in another system. *England* v. *Louisiana State Board of Medical Exms.*, 32 U.S. Law Week 4093 (Jan. 13, 1964). The PUD, having fully and unreservedly litigated the issues in the federal proceedings, has had its day in court.

4. THE LITIGATION BELOW, NOT OUR APPEAL, IS MOOT.

The PUD alone argues (Motion pp. 19-20) that the completion of the trial by the lower Washington court renders this appeal moot.[8] The obvious fallacy in this is that the end of the trial does not mean the end of the state court proceedings. Both the PUD and Beezer have appealed the trial court's decision (see PUD Motion, p. 18; Beezer Motion, p. 2) and both filed motions for new trials.[9] As long as the PUD and Beezer may continue to relitigate Seattle's rights under its Court of Appeals judgment in the state courts at any level, Seattle is effectively barred from

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[7] See PUD's motion, p. 27, fn. 16.

[8] Beezer does not agree for he informs the Court in a note:

> "*While it has no bearing on the jurisdiction of this Court on appeal*, appellee Beezer herewith informs the Court as a fact that the cause below was tried in the trial Court in November, 1963; . . ." (Beezer Mo., p. 2; emphasis supplied.)

[9] These motions were denied by the trial court but are the subject of appeal.

selling bonds necessary for project construction. The continued proceedings in the state courts authorized by the decision below thus directly affect the rights of the litigants and make this a living and not a hypothetical controversy. Obviously this appeal is not moot. *Newport News Shipbuilding and Drydock Co.* v. *Shauffler*, 303 U.S. 54, 58 (1938); *Collins* v. *Porter*, 328 U.S. 47 (1946).

Actually it is not Seattle's appeal, but the decision below that is moot. As the four dissenting judges below properly recognized, the decision we are here appealing was mooted upon this Court's denial of the PUD's petition for certiorari to the Court of Appeals.[10] *Cf. Alton* v. *Alton*, 347 U.S. 610 (1954). The refusal of the Washington court to so rule poses a federal issue upon which this Court is the ultimate judge. *N. L. Liner* v. *Jafco, Inc.*, U.S. , 11 L. ed. 2d 347, 350 (Jan. 6, 1964). Accordingly, the judgment below should be vacated and the cause remanded. *Cf. Dyer* v. *City Council of Beloit*, 333 U.S. 825 (1948).

[10] "That judgment [of the Court of Appeals in *PUD* v. *FPC*] is now final and binding on the PUD, and the original issues before us have become moot, but the majority refuses to accept the decision of the only court that has jurisdiction to decide these issues unless and until the United States Supreme Court reviews that decision. Since that court has refused to review the decision of the court of appeals, I see no escape from the conclusion that the litigation is now ended." (J.S. Appendix A-10.)

5. THE QUESTIONS ARE SUBSTANTIAL.

A. The judgment below permitting a collateral attack in the state courts on the federal licensing proceedings obviously presents a substantial federal question.

There can be no serious question after this Court's decision in *Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958) that the mandamus decision of the Washington Supreme Court below finally upholding state court jurisdiction to litigate matter determined in the federal proceedings prescribed by Congress for the issuance of licenses, raises a substantial federal question. As Mr. Justice Harlan stated in his concurrence in *Tacoma*:

> "... The Court of Appeals in the earlier proceeding had jurisdiction to determine whether state or federal law governed Tacoma's power to condemn the State's hatchery, and that issue itself was a federal question. Section 313(b) of the Federal Power Act therefore foreclosed relitigation of this issue in the present case. ..." (357 U.S. at 341-342.)

Indeed it is the very ordering of further state court proceedings by the court below in defiance of section 313(b), the *Tacoma* decision, and the final judgment of the District of Columbia Court of Appeals, that poses the substantial federal issues now ripe for review under 28 U.S.C. § 1257 pursuant to the precedents of this Court (see *supra*, pp. 5-10; Gov. Memorandum, pp. 10-13).

B. Beezer is bound, like the PUD, and may not collaterally attack the direct review proceedings.

In a further effort to demonstrate that the issues of collateral attack and supersedure raised by the decision below are not substantial, the PUD tries to distinguish *Tacoma*, mainly on the ground that it does

not apply here because Beezer was not a party to the federal proceedings.

The short answer to this is that *Tacoma* holds that Congress vested the federal proceedings under section 313(b) with exclusive jurisdiction:

> ". . . Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final' subject to review by this Court upon certiorari or certification. Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." (357 U. S. at 336-337)

Harris v. *Central Nebraska Public Power & Irrigation Dist.*, 29 F. Supp. 425 (D.C. Neb. 1938) is directly in point on this issue, holding that a person who had not participated in the federal license proceedings could not thereafter collaterally attack the licensee's power to condemn under section 21. After reviewing the notice requirements and citing the review opportunities available under section 313 of the Federal Power Act, the court said (at 428):

> ". . . Such proceedings were disregarded by the land owner in this case. We think they had an opportunity to be heard on the issue which they now raise, but of which they did not avail themselves."

This applies squarely to Beezer. If he is indeed a "stranger" to the licensing proceedings and direct re-

view thereof before the Commission, the D.C. Circuit and this Court which covered the period 1953 to 1963, as the PUD would have us believe (Motion, p. 24), then it is because he failed to avail himself of the ample opportunity to be heard, and may not now complain.

But in the federal scheme of things Beezer is not a stranger in any sense. As this Court held in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 181 (1946), with reference to the "detailed provisions of the Act providing for the federal plan of regulation [which] leave no room or need for conflicting state controls," including section 21:

> "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others." (328 U.S. at 182).

And Mr. Justice Frankfurter, who dissented, nevertheless pointed out in particular the notice provisions which must be given states, and said:

> ". . . If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and *a State cannot thereafter challenge the Commission's determination. . . .*" (328 U.S. at 184-85, emphasis supplied)

If a state would be thus foreclosed from pursuing a matter it had failed to raise before the FPC, then certainly a citizen of the state is likewise foreclosed from making the sort of challenge Beezer does here.

C. The Washington court has upheld the validity of RCW 35.84.030, regardless of its repugnancy to section 21 of the Federal Power Act.

The PUD concedes that the supersedure question is in the controversy. It is a federal question of "great importance" (Motion, p. 31) and might be grounds for a petition for certiorari (Motion, p. 11). But as of the moment, the PUD says ". . . this federal question is premature at this time." (Motion, p. 31.) The claimed prematurity is argued as a matter of convenience only. The fact that the Washington Supreme Court has already decided the question is so inescapable that even the PUD finds it impossible to keep from adverting to this fact.

Two examples will suffice. At page 21 of its motion, the PUD says:

> ". . . In the present taxpayer's suit . . . the Washington Supreme Court *concluded* that no such right [condemnation under section 21] would be conferred on Seattle . . ."

And at page 31, at the very point that the PUD contends for lack of finality in the judgment below because of prematurity, the PUD says:

> "We turn to the last question discussed by Seattle . . . [supersedure]—*the question on which the Washington Supreme Court has expressed its total disagreement with the District of Columbia Circuit. . . .*" (emphasis supplied in both quotes)

CONCLUSION

For the reasons set forth in the Jurisdictional Statement, the Government's memorandum *amicus*, and this opposition to the motions to dismiss, it is prayed that this Court grant the appeal and summarily reverse the Court below or vacate its judgment as moot.

Respectfully submitted,

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February 5, 1964

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No. 677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

THE CITY OF SEATTLE, ET AL., *Appellants*
and
THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Appellant*
v.
ROBERT R. BEEZER
and
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

On Appeal from the Supreme Court of the State of Washington

SUPPLEMENTAL MEMORANDUM RELATING TO MOOTNESS

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February 10, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1963

No. 677

THE CITY OF SEATTLE, ET AL., *Appellants*

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v.

ROBERT R. BEEZER

and

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

On Appeal from the Supreme Court of the State of Washington

SUPPLEMENTAL MEMORANDUM RELATING TO MOOTNESS

In our motion to dismiss Seattle's appeal from the Washington Supreme Court's judgment granting mandamus, we referred (pp. 19-20) to the fact that Seattle's appeal had become moot because the trial judge meanwhile had held the trial which the Washington Supreme Court's writ of mandamus directed him to hold. At the time we filed our motion to dismiss, the trial was completed and the trial judge had announced his ruling on the merits, but he had not yet

made formal findings and conclusions nor had he formally entered his judgment.

Subsequently, on January 23, 1964, the trial judge did make extensive formal findings and conclusions, and on that same date he entered his formal judgment on the merits dismissing the Beezer suit with prejudice. His judgment is set forth in the Appendix hereto. This judgment on the merits has now been appealed to the Washington Supreme Court.

Accordingly, it is clear that, not only in substance but in form, the trial judge has completed all the things he was ordered to do by the writ of mandamus. The writ of mandamus ordered the trial judge to "proceed forthwith to the trial and entry of judgment on the merits" (J.S., p. A-15). Since the trial judge has done everything which the mandamus directed him to do, Seattle's appeal from the judgment granting mandamus has plainly become moot and should be dismissed.

Respectfully submitted,

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February 10, 1964

APPENDIX

Trial Court Judgment of January 23, 1964

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 576444

ROBERT R. BEEZER, *Plaintiff*,

v.

THE CITY OF SEATTLE, ET AL., *Defendants*,

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor*.

ORDER AND JUDGMENT OF DISMISSAL

THIS MATTER came on for trial pursuant to the remittitur of the Supreme Court of the State of Washington dated October 7, 1963. The trial was set to commence on November 12, 1963 before the undersigned judge, sitting by stipulation of the parties as a visiting judge for King County. The parties stipulated that the court should make a pretrial view trip to inspect any properties in Pend Oreille County requested by any of the parties. Plaintiff's counsel agreed to the view trip and agreed further that the view trip be held in his absence.

On October 22, 1963 the court, accompanied by Richard S. White of counsel for defendants, and by C. C. Dill and William G. Ennis of counsel for intervenor, and by engineers employed by defendants and by the intervenor, inspected and viewed (1) the Box Canyon dam, powerhouse and appurtenant facilities, owned and operated by intervenor as FPC Project No. 2042, (2) the gaging station operated by the United States Geological Survey on the left bank of the Pend Oreille River about 1,000 feet downstream from the Box Canyon dam, (3) the site at or near Z Canyon proposed by the intervenor to the Federal

Power Commission (FPC No. 2250) for construction of a dam, powerhouse and appurtenant facilities, (4) other properties along the Pend Oreille River in which the intervenor has some right or interest, including shorelands on both banks of the Pend Oreille River and uplands west of the Pend Oreille River near Z Canyon, and (5) the site known as Boundary licensed by the Federal Power Commission (FPC No. 2144) to the City of Seattle for construction of a dam, powerhouse and appurtenant facilities. The court held a pretrial conference in Seattle on October 25, 1963, attended by counsel for all parties.

Trial of this matter commenced on November 12, 1963. Plaintiff appeared *pro se* and by his attorney, Alfred J. Schweppe. Defendants appeared by their attorney, Alfred L. Newbould, corporation counsel, by Richard S. White, Robert L. McCarty and Richard W. Bartke, as special counsel. Intervenor appeared by its attorneys, C. C. Dill and William G. Ennis. Witnesses were sworn and testified. Exhibits were introduced in evidence. Copies of transcript of the proceedings were furnished daily to the court and to the parties. Written briefs were submitted by the parties covering various questions of law. All parties rested on November 27, 1963. By stipulation of the parties and request of the court, proposed findings of fact and conclusions of law and forms of judgment were submitted to the court on January 3, 1964. The court heard oral arguments of counsel on January 9, 1964, after having considered the proposed forms of findings, conclusions and judgment submitted by the several parties and having reread and considered the exhibits and the entire transcript of the testimony in the cause. The court having made and entered its findings of fact and conclusions of law and being fully advised in the premises,

It Is Hereby Ordered that the above-entitled action and the complaints of the plaintiff and intervenor be and they are hereby dismised with prejudice, and

IT IS FURTHER ORDERED that defendants have and recover their costs to be taxed against both the plaintiff and the intervenor.

DONE IN OPEN COURT this 23rd of January, 1964.

W. R. COLE
Judge

PRESENTED BY:
RICHARD S. WHITE
Of Attorneys for Defendants

APPROVED AS TO FORM AND NOTICE OF PRESENTATION WAIVED:
ALFRED J. SCHWEPPE
Of Attorneys for Plaintiff

APPROVED AS TO FORM AND NOTICE OF PRESENTATION WAIVED:
C. C. DILL
WM. ENNIS
Of Attorneys for Intervenor